Brief for Appellant

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

JOHN B. REYNOLDS, as Sole Executor of the last will and Codicil of LUCY FAYERWEATHER, deceased,
Cross-Complainant and Appellant,

vs.

THOMAS G. RITCH, Individually, &c., and as Executor, etc., and others,
Defendants.

In Equity.

BRIEF FOR SAID CROSS-COMPLAINANT, APPELLANT.

Your Honors will ask,

FIRST.

What *is* this case?

SECOND.

What has been *done* in it?

THIRD.

How does it get into *this* Court?

FOURTH.

Why has *this* Court *a right* to deal with it?

FIFTH.

What is this Court asked *to do?*

Answers to the *first three* questions will be found in the following Outline, or "Introductory Statement."

Answers to the *other two* questions with be found in the latter part of this Brief.

INTRODUCTORY STATEMENT OF FACTS.

The Record will be cited by the Volume in Roman numerals, and the pages in Arabic numerals.

The regular Record is in Volumes I, II, III and IV. Vol. V is the Surrogate's Record of the Probate Contest of the Will of Daniel B. Fayerweather. Vol. VI is the Record of Amherst, &c., et al. v. *Ritch et als. Vol. VII is a copy of the Briefs for these Complainants, and for this Cross-Complainant in Amherst et al.* v. *Ritch et als.*

This is an appeal by John B. Reynolds as sole executor of the last will and testament of Lucy Fayerweather, late widow of Daniel B. Fayerweather, deceased, from the Final Decree of Judge Lacombe, entered October 10th, 1902, in the Circuit Court of the United States, for the Southern District of New York (Vol. IV, 777).

Said Decree was rendered upon the Bill of Com-

plaint of the Complainants, who are also Appellants herein (Vol. I, 1).

Upon the Cross Bill of this Cross-Complainant, Appellant (Vol. I, 262);

Upon the Pleas and Answers of Defendants to said Bill ;

And to said Cross-Bill (Vol. I, 176, 190, 191, 206, 209, 230);

And upon the *Replications* of the Complainants, and of said Cross-Complainants, to said Pleas and Answers (Vol. I, 188, 190, 232, 239) ;

The *controversy* in this action is over the ownership of a part of the *residuary* estate, namely, of about $2,500,000, with interest thereon for about fourteen years, of said Daniel B. Fayerweather, a leather merchant, late of the City of New York ;

Who died there, November 15th, 1890, aged 68 years ;

Leaving an estate of upwards $6,000,000.

(See affidavit of Executors Bulkley and Vaughan filed March 14th, 1904, with the moving papers to advance the argument of this cause.)

He left a widow, Lucy Fayerweather, and but three heirs-at-law and nextof-kin,

namely, his nieces, Emma S. Fayerweather and Mary W. Achter, both of Muscatine, Iowa ;

and Lucy J. Beardsely, of Bridgeport, Connecticut.

His Alleged Last Will and Four of Its Five Codicils.

(IV, 183-197.)

December 5th, 1890, his last will, dated October 6th, 1884, and *four* of its *five* codicils, were offered to the Surrogate of the County and State of New York for Probate (IV, 240).

They gave the widow the home at number 11 East 57th street, New York City, with its contents. Also the stable at 149 East 57th street, New York City (IV, 183-197).

Said house, contents and stable were worth about.....	$100,000
Cash	$10,000
And, in lieu of dower in the "Discretion" of his Executors, an Annuity of	$15,000
To said Lucy J. Beardsley.....	$100,000
" " Mary W. Achter.....	$20,000
" " Emma S. Fayerweather.....	$20,000
Other *personal* bequests, which, *with* the above, amounted in all to.....	$291,600
For purchase of tomb.....	$5,000
By paragraph Eighth, to Five Hospitals *in all*.....	$95,000
By paragraph Ninth, to 20 Educational Institutions *in all*.....	$2,100,000

By paragraph *eleventh*, the *residue* to said institutions to be divided among them, *share and share alike.*

By a *Fifth* Codicil, *made* while the testator *was dying*, he gave his *entire residue*, of about $3,500,000, to his executors named in it—to wit.: to Ritch, Bulkley and Vaughan, individually, *absolutely* (IV, 196).

Objections to Probate.

December 5th, 1890, the widow and next-of-kin duly filed *objections* to the Probate, alleging (II, 172–182):

First; *Non est factum.*

Second; Undue Influence.

Third; Incompetency to make.

The Probate Contest.

A contest thereupon proceeded before Surrogate Ransom for about ten days.

A Deed of "Gift".

February 24th, 1891, said Ritch, Bulkley and Vaughan made a Deed of "*Gift*" (IV, 198–204) of said residue, of about $3,500,000, to eleven hospitals and twenty-one colleges as *their* donees, as specified therein.

Then they *notified* the widow and next-of-kin, that they *had* thus *given away* the *residue* (V, 56).

(IV, 230) February 25, 1891, said *will* was *admitted* to probate.

(IV, 234) March 24th, 1891, the first, second, third and fifth (but not the fourth) *codicils* were admitted to probate.

A Settlement Agreement.

(IV, 205) March 5th, 1891, said three men made an agreement to pay to the widow $225,000.

And to said Mary W. Achter, $42,500; and to said Emma S. Fayerweather, $42,500. Or, *in all*, to the three, $310,000, for *withdrawing* their objections to the probate and for their agreements to give general *releases*.

(IV, 206) Also to *deed* to the widow, her husband's *tomb* at Woodlawn Cemetery.

Agreement to Postpone Receipt of their Legacies.

(IV, 245) March 5th, 1891, said twenty colleges, at the request of said three executors, executed an *agreement* to *postpone* the receipt of *their* specific legacies, of in all, $2,100,000, under the *ninth* paragraph of the will, until *after* the payment to the *widow* and said next-of-*kin* of said $310,000.

Objections to Probate Withdrawn.

March 12, 1891, said objections were thereupon *withdrawn* (IV, 227-228).

General Releases.

(IV. 210-212) June 12th, 1891, said three men prepared *releases* to themselves as executors, trustees, and individuals; also to the donees under their said deed of "gift", of all claims against said estate, and against them or either of them. They procured the execution of these releases by the widow and

said next of kin, upon representations that the latter owned *no* part of said residue (V, 1308–9; 2054; 2701–3).

That said *three* men owned it, individually, *absolutely*, until they deeded it to said donees; who then owned it absolutely; That said $310,000—(or about ten per cent. of one-half of said estate)—was a "Gift" under a right reserved by said three in said deed, to make the same; of money that they three men, thus claimed that *they* owned *absolutely*.

The Widow an Invalid for Many Years.

For about twelve years before Mr. Fayerweather's death his said widow had been a chronic sufferer from diabetes (II. 484–491). *After* she had released, she was advised of her rights; and of her interest in said residuary estate, so far as said three men had then *divulged* the proof of said rights and interest.

The Widow's Power of Attorney.

(IV. 279) Thereupon June 12th, 1892, she executed a Power of Attorney to John B. Reynolds, the husband of her sister, formerly Anner Amelia Joyce, reciting that:

> "My said passive acquiesence in, and submis-
> "sion to the terms and conditions of said com-
> "promise and discontinuance, *were due to* my
> "physical *weakness*, the result of protracted
> "illness; whereby I *was* at the time of said com-

" promise and discontinuance, and long after-
" wards continued to be *unfit, and practically*
" *incapacitated* to *transact business*; and to
" rightly *understand the terms of said com-*
" *promise, and its consequences to myself,*
" *and those dependent upon me.* Which con-
" sequence I *now* understand and *deplore*; and
" *am no longer willing to acquiesce in, or be*
" *bound by.*"

She then constitutes and appoints the said John B. Reynolds

" my true and lawful attorney in fact, for me,
" and in my name, place and stead to promptly
" use all lawful means for *annulling* and
" *setting aside*, or modification in my favor, as
" he may under the advice, of counsel, skilled
" in the law, of *said compromise*; and of each
" and *all* of the acts, in anyway *affecting me*,
" or *my interests* thereunder.

" Hereby authorizing my said attorney in my
" name to employ counsel to bring *any* and all
" proceedings, and suits at law, and *in equity*,
" in and before *any* Court or Courts, in said
" State, or elsewhere; to carry on or prosecute
" the same, and defray, at my own proper
" charge and cost, the necessary expenses
" thereof; to make and execute in my name
" any and all contracts, and other papers,
" which may, in his discretion, be necessary or
" convenient to the initiation and conduct of
" any proceedings, *suit or suits*, for the en-
" forcement of my right to the possession,
" ownership, and enjoyment of a reasonable
" and satisfactory share of the property and

"estate of my said husband, the late Daniel B.
"Fayerweather, deceased."

Reynolds as Exr. v. Ritch, &c., et al.

(IV. 698) July 11, 1891. She entered suit in the New York Supreme Court against Ritch, Bulkley, and Vaughan, individually, and as said executors and trustees aforesaid;
against said legatees;
and said donees.

(IV. 698) July 16, 1891. She died.

The Widow's Will Probated.

(IV. 698) Her will, and a codicil thereto, were duly admitted to probate by said Surrogate, and said John B. Reynolds and Morris B. Beardsley, were appointed, and duly qualified as its executors.

Said Beardsley was the husband of said Lucy J. Beardsley, and was an ex Judge of Probate at Bridgeport, Connecticut. As her said executors, they revived said suit that she had brought, and served the bill of complaint therein (IV, 698).

It will be referred to in the present action as the case of *Reynolds* v. *Ritch*. Thereafter said *Beardsley retired from* said executorship, and was relieved by said Surrogate.

The Trustees of Amherst College et al. vs. Ritch et als.

An understanding having been reached, between the widow's executors and said twenty colleges, that some of the latter would sue, to fasten a trust

for them, upon said residuary bequest ; which trust was also asserted by the executors of said widow, and by said next of kin ; the plaintiffs in the above suit of Reynolds *v.* Ritch would not go on. They did not.

April 25th, 1893. The Court dismissed the action with costs ; which were paid. There was *no* trial *upon the merits.*

Pursuant to said understanding, five of said twenty colleges, namely—Amherst, Williams, Dartmouth, Hamilton and Rochester—accordingly brought, in the N. Y. Supreme Court, the suit of the Trustees of Amherst College *et al. vs.* Ritch, *et als.*

They named as defendants therein Ritch, Bulkley and Vaughan, individually, and as executors and trustees ;

said five hospitals, named in the *eighth* clause of the will ;

the other *fifteen educational institutions* named in the *ninth* clause of the will ;

the individual legatees, named in the will and its codicils ;

the donees in said deed of gift ;

and the widow and next-of-kin.

Object of Said Suit.

This suit was to determine who *owned* said *residuary* estate of about $3,500,000 (I, 26–41).

It was *three-cornered.* The *twenty colleges* claimed that the apparently absolute devise of said residue in the death-bed codicil, was *not* absolute.

But was upon a *secret trust for them.*

Ritch, Bulkley, and Vaughan, and their donees —*denied* said trust (VI, 43–53).

They claimed that said devise and bequest *were absolute*. That said three men had the *entire* right to do as *they* liked with said residue. Hence, that it belonged to said hospitals, and said colleges, as *donees* under said deed of "*gift*".

A Counterclaim (I, 42).

The executor of the widow, said Emma S. Fayerweather and said Mary W. Achter, for a defense and *counter-claim* in said suit, in their answer, averred that Chapter 360 of the N. Y. Laws of 1860, *prohibited* the devise or bequest by a man, having a wife, *of more than one-half* of his estate, to charitable, literary, or scientific-corporations.

That, as to the *excess*, over said half, such a devise or bequest was *void*.

That said testator had given his residue absolutely, upon the face of said will to said twenty colleges, *in addition to* their *specific* legacies of, in all, $2,100,000; that, as to *one-half* of his net estate, said will was *void*.

Memorandum No. 1.

That, with it, he signed Memorandum No. 1 (IV, 220), drawn by Ritch, dated October 6th, 1884—the date of the will—saying

> "This certifies that I have executed my will
> "of this date, *having been advised by my*
> "*counsel of the provisions and restrictions* of
> "the law of this State relative to benevolent
> "corporations. *I trust my heirs will permit*

"the provisions of this my will to be carried "into effect" (Vol. V, 1129–36).

That December 11th, 1884, by a *first* codicil, he gave his residue, to Ritch and Bulkley absolutely.

Memorandum No. 2.

But that with it, he signed the following memoradum No. 2 (IV, 220), drawn *by Ritch.*

"Private Memorandum.

"I have made Messrs. Bulkley & Ritch my "residuary legatees, *in the confidence* that "*thereby* my intentions *as expressed in my* "*will* shall be carried into effect, and without "litigations *on the part of any person or* "*persons, interested.* In case of my death, I "trust they will take such steps, by will, or "otherwise, as will protect my estate against "the contingency of the death of either, be- "fore my estate is settled and distributed."

That this paper was enclosed in an envelope on which Mr. Fayerweather had written: "Messrs. J. L. Bulkley and T. G. Ritch", and underneath:

"To be opened *in case of my death.*"

That said Ritch procured said codicil and memorandum, *by taking undue advantage of his position*, as legal adviser of said testator; by *undue influence*, *mis*representations, *coercion*, and *fraud*, on his part, and Bulkley's.

That said devise and bequest to them absolutely, were *frauds* upon said testator;

and fraudulent and void, *as against his widow, heirs-at-law, and next-of-kin;*

That Ritch and Bulkley, *ever since the death* of said testator, have been, and now, *are trustees of said residue*, for said *widow*, and the executor of her will; and for said heirs-at-law *and next-of-kin.*

That said *fifth*, or death-bed codicil, *adding Vaughan* as a *residuary legatee*, with Ritch and Bulkley, *was obtained* while said testator *was dying;*

by *undue* influence, *mis*representations, *coercion* and *fraud*, on the part of said three men.

That the same were frauds upon said testator; upon his widow, heirs at law and next-of-kin.

And that said three men *are trustees of* said *residue, for said widow and her executor, and for* said heirs and *next-of-kin.*

That said three, having obtained *possession of* said estate, took undue advantage *of* their *fiduciary* relations as trustees of said window and next-of-kin; and of their *superior situation* and *knowledge of* said estate, to defraud said *widow;* who was then *a feeble invalid*, suffering from the mortal disease, of which she later died.

Also to defraud the said Mary W. Achter and Emma S. Fayerweather, heirs at law and next-of-kin, residents of Iowa, of their rights and interests in said residuary estate;

By falsely and *fraudulently denying* said secret trust.

By claiming to own said residue *absolutely*, and by attempting *to dispose of it* by said deed of "*gift.*"

Violating their duty as said trustees, by *fraudulently denying* and *contesting* the rights of their said *cestuis que trustent*, to any part of the same.

By threatening to continue said contest indefinitely.

To withhold *all* payments from said ladies, while it continued;

Thereby *to tire them out* and to *impoverish* them.

By omitting and neglecting to make *full* and *fair disclosure* of the truth, in respect to said trust and said estate, and *the rights of* said *cestuis* therein.

And that, by otherwise abusing their *fiduciary* positions, and violating their duties to said ladies; they *coerced*, *deceived*, and induced said widow, who was *ignorant* of her rights in said estate, and of the facts and law in respect thereto;

And who was weak and timid;

And, by reason of her enfeebled condition, was easily persuaded to accept *anything* rather than litigation with her said trustees.

To withdraw her objections; to consent to said probate;

And *to release* to said trustees, *her interest* in said *residuary* estate, which was then of the value of upwards of $1,500,000. for the *grossly inadequate consideration*, of an increase of $10,000 in her annuity; and for $225,000.

That said Mary W. Achter and Emma S. Fayerweather,—residents of a State distant from New York,—*were ignorant of their rights* in said estate;

And of the facts and law in respect thereto;

And by reason thereof, and of their scanty means, were easily persuaded by said three men to accept *any thing*, rather than a prolonged and expensive *litigation* with them,;

And to *withdraw* their objections to said probate;

And *to release* to said three men, their interest in said residue, each then, of the value of upwards of $500,000,—for the grossly inadequate consideration of $42,500 each.

That pursuant to said arrangement, said ladies executed said *releases* and delivered them to said men. That said settlement and release *are fraudulent and void;* and should be *set aside.*

That they offered then to restore; and to properly account.

They prayed judgment that the devises and bequests in the first and last codicils are fraudulent and void.

That said three hold said residue in trust *for them;*

That said releases are fraudulent and void;

And that they be set aside upon such terms as may be just and equitable.

That said deed of "gift" be adjudged void. For injunction and an accounting.

That the ultimate rights of the parties in said estate be determined and enforced, as set forth and prayed in this action.

And for such further relief as may be just and equitable.

No Reply to Counterclaim; hence it was Admitted.

No reply was *ever* served to said counterclaim, under the N. Y. Code of procedure. It therefore stands *admitted.*

In their briefs, in said action of Amherst *et al.* v. Ritch *et al.*, said twenty colleges asked the Trial Court,—Justice Truax,—to find that, while said Chap. 360 of 1860 forbade willing more than *half* to such corporations; it was not WILLING it to *them*, when it was willed *to individuals*.

That if said individuals received it upon their *promise* to carry it to said institutions; it was still not *willing* it to the latter.

Hence that it did not come within the prohibition of said statute.

The Trial Court's—Justice Truax's—Decision in Amherst v. Ritch.

Justice Truax so *found*. (Opinion I, 20-51, Decision I., 63, Judgment I., 66.)

He made *no* findings of facts, Section 1022a, of the N. Y. Code of Civil Procedure (passed 1894, repealed)—instead of findings, allowed the Court to make a *single short* form of decisions—stating concisely its *grounds* (IV., 49-50).

Justice Truax did *the latter*.

He held, in effect, that the $2,100,000 of *specific* bequests, to the 20 colleges were illegal.

That the devise and bequest of the $3,500,000 of *residue* was to *individuals*. Hence it was also *legal*.

Because it was not WILLED to *institutions* of the prohibited class.

Therefore, that, *beyond* the specific devise to the widow; and the specific bequests to her and the the next-of-kin; they had *nothing* to release.

That the 10 per cent. they got for their releases,—in the words of Justice Truax—" *Was the same as money found*" (I, 522).

In his opinion he says (IV., 50):

> " *The view* that I have taken of the facts " and the law of this case, *renders it* UNNEC- " ESSARY for me TO CONSIDER the very inter- " esting question of law, propounded by the " learned counsel *for the defendants*, " Reynolds, Achter and Fayerweather."

Said Code allowed *one* broad *exception* to cover *all* questions of law and fact, upon appeal.

Counsel for the widow and kin duly filed such exception; and appeal was taken (IV, 10–14).

Decision of the General Term.

The General Term of three Judges held (IV, 54–59):

That you can not do *indirectly* what cannot be done *directly*.

That as to the *residue* of the net estate, *above* one-half,—Mr. Fayerweather had died *intestate*.

That, from the moment of his death,—the residue *belonged to the widow and next-of-kin*.

But that they *had released*; and that there was " *no* " evidence in the record, justifying the contention that their releases were obtained by fraud; and by undue influences.

In a dissenting opinion, Van Brunt, P. J., held that said Act of 1860 did not apply *to nieces*.

And that the release by the widow, could not be *successfully* attacked.

Testimony of Hon. Alton B. Parker.

Honorable Alton B. Parker was one of the two Justices who rendered the opinion of the said Court at General Term.

He has since been examined as a witness herein, and testified thus.

> "(III P. 563.) Q. "Do you mean to be "understood, in giving your last answer in "chief, that the three Judges at General Term "*considered* in consultation, *and decided* that "*none* of the evidence adduced by the widow "or next-of-kin before Judge Truax, had *any* "legal tendency to establish the charges of "fraud or other charges set up by them in their "answers to impeach the settlement and their "releases? A. My recollection is not very "distinct, of course; but it is, *not that there* "*was* not *any* evidence; but that there was "*not sufficient* evidence to impeach them."

Decision of the N. Y. Court of Appeals.

Upon appeal to the N. Y. Court of Appeals, that Court held (151 N. Y., 320):

FIRST.—That it could ASSUME that the effect of the decision by the Trial Court—Justice Truax—was the same, as it would be, if there had been a *general* verdict of a jury. With the same PRESUMPTIONS for its support.

That, when the judgment, entered upon a verdict, has been affirmed by a General Term, the

Court of Appeals can *only* look into the evidence *far enough*, to see if *any* facts were proved, upon which the verdict could rest.

Hence, that, where the decision of the Special Term does *not* state the facts found; and its judgment has been affirmed at General Term; upon appeal to the Court of Appeals, *all* facts alleged in the complaint and warranted by the evidence, necessary to support the judgment below, *are presumed* to have been found.

Hence, that it was *beyond the jurisdiction of* the Court of Appeals, to deal with *the facts*.

That this conclusion takes the question of fraud upon the widow *out* of the case.

> "For it cannot be said, on the record before
> "us, that *the evidence* tending to *show fraud*,
> "*is so irresistible*, as to make the omission to
> "find fraud an error of law."

(p. 322) SECOND.—That there *was* a secret trust.

(p. 328) THIRD.—That it was *for the 20 colleges*.

That Justice Truax was *not* bound *to believe* Vaughan.

And it states 12 reasons why.

(p. 332) FOURTH.—That, before releasing, the widow and next-of-kin *could have* availed themselves of chapter 360 of the laws of 1860.

FIFTH.—That the releases CONVEYED NOTHING, and were mere waivers *extinguishing*, but *not transferring*, the rights of the widow and next-of-kin. That (p. 338)

> "The words used in the first paper, there-
> "fore, were fit and proper to *waive* and *extin-*
> "*guish* the right of the widow and next-of-kin

"to bring such a suit in equity: *but were* "*neither fit nor proper*, nor can they by any "reasonable construction be said to have the "effect *to transfer or assign* anything to "anyone.

"The concluding words corroborate this "theory, for they are a *promise* 'to execute a "general release of all claims' to the executors "and to their donees, but *not to transfer any-* "*thing* to either. While the word 'release' *is* "sometimes used in conveyancing to transfer a "title, its *general* meaning is to *surrender* a "right or to discharge a liability, and when it is "used in connection with the word '*claims*' as "it is in the paper, under consideration, it never "has *any other* meaning than that of *waiver*, "*surrender or relinquishment. No* right of ac- "tion can pass by *a release* of all causes of "action."

That Ritch, Bulkley and Vaughan were *double* trustees.

First, for the 20 colleges.

Second, for the widow and next-of-kin.

And that "The *latter* trust *was paramount to* the former."

Hence, that if said three men bought our rights, they bought them *for the twenty colleges*, and *not* for the *donees*.

(p. 341) *Fifth.*—That the 20 colleges were *not* equitably estopped by their *agreement to postpone* the receipt of their specific legacies.

(p. 342) *Sixth.*—That the Collateral Inherit-

ance adjudication that said three men owned *absolutely*, did *not* effect the result.

Dissenting Opinion of Chief Judge Andrews.

(p. 343) Chief Judge Andrews, in a dissenting opinion, held that, had Mr. Fayerweather died *without* having changed the original will, the second half of the net estate *would belong to the widow and next-of-kin.*

P. 345. "That "*No other* conclusion is *pos-* "*sible.*" The devise or bequest to the "twenty colleges was invalid, as to the "excess; for so the statute declares. It "could not go to the residuary legatee; "*because* they took it *in trust for* the "*corporations.* The *intention* of the testator "could not be enforced, because the disposition "he attempted to make *was illegal.* The cor- "porations could not stand upon the devise and ,' bequest in their favor, *because* the statute, "which prohibited the gift, *necessarily pre-* "*cluded* them from insisting upon the validity "of the disposition.

"In all cases, upon the death of the owner of "the property, the title devolves upon *some* "*one;* either under his will, or upon his heirs "or next-of-kin; or escheats to the State. "If he undertakes by will to dispose of his prop- "erty in a mode, or for purposes, which the law "*prohibits*, the *attempted disposition is void*; "and in the absence of any alternative valid "disposition by the will, *it goes to his heirs* "*and-next-of kin*, by operation of law.

" For no moment of time is the title *sus-*
" *pended in the case just supposed, the rights of*
" *the heirs and next-of-kin attach* immediately
" upon the death of the testator, and the will at
" most *is a mere cloud upon their title.* Their
" right would vest *immediately, without* the in-
" tervention of any court; and an appeal to the
" court would be necessary *only* to put them in
" *possession* of their right—in case it was de-
" nied or withheld. * * *

P. 348. " 'It is *not* sufficient', says the
" Chancellor in Haxton *vs.* C. Corse (2 Barb.
" Ch., 521), 'to deprive an heir-at-law, or dis-
" tributee, of what comes to him by operation
" of law, as property *not* effectually disposed
" of by will, that the testator should have
" signified his *intention* by his will, that his
" heir or distributee should *not* inherit, any
" part of his estate'.

" But, to *deprive an heir or distributee of his*
" *share of the property, which the law gives*
" *him*, in case of *intestacy*, the testator must
" make a *valid* and effectual disposition
" thereof, to some *other* person.'

P. 352. " The Court is asked to hold in
" *this case* that a scheme *contrived* by
" the testator *and his residuary legatees*
" *for the purpose of circumventing the*
" *statute of 1860*, and to make a posthu-
" mous gift, of a very large estate, to
" corporations, to whom the testator *could not*
" give it directly by will—through the device
" of a constructive trust, is *not* in contravention
" of the statute of 1860. I *cannot* assent to this
" proposition. *It has*, in my judgment,
" *neither reason nor authority in its favor.*

P. 352. "The language of Lord Eldon, in "Strickland *vs.* Albridge (9 Ves., 516), *is appli-* "*cable* to this case. "It would," he said, "be "*a strong proposition* that the providence of "the Legislature, having attempted expressly "to prevent a disposition of land *for purposes* "*of this sort*, was so *short* as to be baffled by "such a transaction as is stated by this bill.

"The attempt here is to separate the strictly "*testamentary* act from the *secret arrange-* "*ment;* and to refer the right of the twenty "colleges exclusively to the *latter*.

"But *the will* is a *necessary and indispens-* "*able element* in establishing the alleged *trust*. "The testamentary gift and the secret arrange- "ment *are inseparably conjoined*. The plaint- "iffs can not proceed a step without showing "*the will* and the *testamentary* gift. It is *only* "by attaching to *this the promise* of the re- "siduary legatees, that it can be pretended "that *any* trust in *their* favor arises." * * *

P. 353. "This statute prohibits *all* bequests "or devices to corporations named therein, *be-* "*yond* the permitted amount, in trust, OR "OTHERWISE. "That is, as I construe it, in trust "for the corporation, or in *any other* manner." "And it would, I think, be a narrow and mis- "leading view, to hold that it does *not* prohibit "the device resorted to in the case before us.

"If I am right up to this point, it neces- "sarily follows that, *immediately on the death* "of the testator, *a resulting trust* in the *resi-* "*due* of the estate *sprang into existence in* "*favor of the widow and next of kin*, which "the Court would transform into a *legal* "estate *by compelling a transfer by* the resid- "uary legatees *to them* of the legal title.

" *They could not*, under the findings, retain " the property for *their own* benefit; the *twenty* " *colleges could not enforce the illegal trust*, " attempted to be created in *their* favor; and " the *only other* alternative was a resulting " trust in favor of the widow and next of kin.

" This, trust, *eo instanti*, on the death of the " testator, *displaced the unlawful trust at-* " *tempted* to be created in favor of the twenty " colleges.

" *It was* therefore, *essential*, to support a " claim by the *twenty colleges* to the fund, that " they should be able to show a right thereto " *derived from the widow and her next of kin.*

" *They* were the *equitable* beneficial owners, " and *their* interest, under well settled rules, " prevailing in this State *was* assignable. They, " *as owners, could transfer* their rights and in- " terests to the twenty colleges; or to any other " persons or corporations, by an act *inter vivos.* " It would be a transfer of *their own* property, " *not* within the Act of 1860.

P. 354. " But it would *not* be enough to es- " tablish the title of the twenty colleges, for " them to show that the widow and next " of kin *had divested* themselves of " their interest. *It must appear* that it " had been *acquired by* the twenty col- " leges; or that *an assignment*, was made to " some other person or persons; which by *the* " *terms of the assignment, or* by *operation of* " law, inured to their benefit.

" I repeat, the *attempted* trust in favor of the " twenty colleges *being void*; and the resulting " trust in favor of the widow and next of kin " *attaching* to the fund, *no title thereto can be*

" *asserted* by any person or corporation, *except* " a title derived from *or under the widow and* " *next of kin.*"

P. 356. " * * * *It seems impossible to* " *read these releases*, in view of the *circum-* " *stances* which led to their execution, without " being forced to the conclusion that they were " executed *with the intention, and for the sole* " *purpose of* giving effect to, and confirming " the deed of gift, of February 24, 1891.

They acknowledged the receipt of the consideration from Bulkley, Ritch and Vaughan, as representatives of the donees under the deed of gift.

P. 357. " They 'remise and release' *to the* " *donees* under the deed of gift, and to Messrs. " Bulkley, Ritch and Vaughan, 'as representa- " tives of said donees.' *They annex the deed of* " *gift to the release, in order that* the persons " '*to whom* the release runs' may be *identified.* " This transaction, if it has *any* meaning, *was* " *to make good the deed of gift;* which, *with-* " *out* the confirmation of the widow and next " of kin, would be ineffectual; and give *no* " title to the donees.

" *The absence of specific words* of transfer or " sale is *of little moment, if the intention is* " *plain. The intention* is the *cardinal fact* in " the construction of *written* instruments. " Where the words permit an instrument to " operate in *either* of two ways, it is effective " for the way at which *the intention* points; " when *that* can be ascertained, by *reading* " the instrument, in the light of the surround " ing facts.

" In former times, certain *technical* words

" were essential in deeds of realty. Here the " property was mainly *personal;* and in re- " spect to the creation of interest in *personal* " property, *formal words are not important,* " *if the substance* of the transaction *intended,* " *can be ascertained.*

" Unless the releases operate as confirmation " of the deed of gift, it has no operation what- " ever as to the donees to whom this release " runs. The release, *for greater precaution,* " extended to the executors in their official " character, and to them as individuals; but " this *accentuates* the fact, that the *para-* " *mount* purpose *was to ratify and confirm the* " *deed of gift.*

" And, *finally*, on this point, whatever may " be said as to the release operating *as a* " *transfer to* the donees in the deed of gift, " *there can be no pretense* that the widow and " next-of-kin *intended* to transfer their inter- " est *to the twenty colleges. They* are *not*, in " *any* way, *referred to* in the written instru- " ments; and it is difficult to perceive how a " transaction can inure to *their* benefit *con-* " *trary to* the *intention* of the parties; and " which would give it the practical effect of " rehabilitating the illegal trust. * * *

P. 358. " I think the judgments below are " erroneous, and that the *donees* under the " deed of gift are entitled to the fund."

Motion to Amend the Remittitur; Because of Lack of Due Process of Law.

(lv.–113–142) Immediately after this decision, a motion was made that the Court of Appeals *amend* its remittitur;

Upon the ground, that Justice Truax, *had not heard, considered or decided*, the question of the *validity* of the *releases*.

That, as was laid down in Bartholf *v.* Reilly, 74 N. Y., 519. *Due* process of law *consists of* "*notice, hearing; and judgment.*"

That, as his opinion showed, he had *not considered or decided*, this *the hinge-issue* in the case.

That, as the widow and next-of-kin *owned* the second half, they could only part with it by a *legal transfer*.

That, whether their transfer was *legal*, and should *stand;* or was *illegal*, and should *fall*, had *not* been *tried* by the Trial Court Justice Truax.

That the two Appellate Courts *were without jurisdiction* to try an issue, which had *not* been *tried*, by the Trial Court; Because, as to *such* a question, they are Courts *of review only;* and *not* of *original* jurisdiction.

Hence, that the widow and next-of kin had been *deprived of* their *property*, *without* due process of law.

The respondents urged that the Court of Appeals had no power *to mandamus* a Trial Judge. Hence, that the motion must be denied. It *was* denied; *no* ground being stated.

The Present Suit.

Remediless in the State courts, the two complainants herein, being citizens of Iowa, and all defendants being citizens of *other* States than Iowa; the bill of complaint in the present suit in equity was filed in the Circuit Court of the United States for the Southern District of N. Y. about June 27, 1897, and was later amended.

The Bill of Complaint.

The bill of complaint alleges as follows:

Diversity of Citizenship.

The trial of said suit of Amherst, etc., *et al.* v. Ritch, etc., *et al.* in the N. Y. Supreme Court.

That the *validity* of said releases was a *material* and *necessary* issue. That it was the duty of said Court *to decide said issue*, as to the *validity*, *before* a *valid* judgment AND DUE PROCESS OF LAW, could be had.

That said residuary estate was within the jurisdiction of said State Court, to the value of upwards of $3,000,000. That, at the death of said testater, upwards of $2,000,000 by operation of law became the property of said complainants; and of the widow of said testator.

That, save as diverted by said releases, they had *immediate* right to the possession and enjoyment thereof, which then remained in Ritch, Bulkley

and Vaughan, who claimed the legal title thereto, as executors, or as residuary legatees.

But *in fact* were holding it *in their own wrong*, under color of a void, secret Trust, *and used their possession and control* of it *to coerce* the next of kin, ignorant of their rights to release.

Upon an *inadequate* consideration paid to them by said three men *out of* money WHICH ALL THE TIME BELONGED TO SAID NEXT OF KIN;

and which said men so withheld from them.

That the releases were delivered, *under the circumstances and misrepresentations*, induced by wrongful acts, set forth in said *answer*.

That, at the trial, the defendants, *combining* to *prevent* the entry of a judgment upon an *actual* determination of the invalidity of said releases, so in issue, *requested and induced the Courts to decide* that *the rights* of the respective parties to said residue *did not require any consideration or decision of said issue* as to said *validity*.

That said Court thereupon *so* decided, *without* considering, passing upon, or including in its judgment *said* issues, *and omitted to decide* as to the right of the next of kin to the affirmative relief, prayed by their said answer in respect to said *releases*.

That the General Term *was informed* by the record that *said issue*, as to the releases, had *not* been *considered* or *decided*, or included *in the judgment* of the Trial Court.

That the General Term had no *original* jurisdiction, but sat only as a Court of *review*; and for the correction of *errors*. That it was its *duty, pursuant to due process of law*, to the provisions of the Constitutions of the State of New York AND OF

THE UNITED STATES *to require* the Trial Court *to, in fact, consider, decide and include said issues in its judgment.*

That, until *that* was done, the General Term *could not* adjudicate if any error had been committed, as to said issues, by the Trial Court.

Nevertheless, that said General Term, *by fictions of law imputed* to the Trial Court that it *had* decided said issue, in favor *of the 20 colleges; contrary* to the *truth*, and the facts.

Thereupon it held that there was *not sufficient* preponderance of evidence to support the asserted invalidity, to render such imputed determination of the trial Court, error, as matter *of law.*

That it was *not competent for* the General Term to exercise *original* jurisdiction; and to decide said issues, and to modify said judgment, so as to include the *actual* determination thereof.

That said General Term did *not exercise* such power; but confined itself wholly to the consideration *of errors* in the record.

That the Court of Appeals held that the widow and the next of kin had *no standing* to be heard *there.* Or to have their rights determined; because *it* had *no* jurisdiction to look into *the facts.*

But was bound by the formal *record;* and by such *fictions;* and had *no power to* review them.

That *pending* said trial and appeals, the control of the several Courts below *was suspended.*

That, upon said decision by the Court of Appeals, it was placed *beyond* the Power of *any* State Court *to correct* said injustice, except as the Court of Appeals might, by *amending* its remittitur, empower said subordinate Courts to try said issues.

That the complainants herein *have exhausted* their remedy in the State Courts; and *unless* they obtain relief *here*, will suffer *irreparable* injury.

That, *by the settled rule of property*, established by the *prior* decisions of the Court of Appeals, ever since its creation, said residue would *not* go to the twenty colleges. That said decision is hence, *not* binding upon the Circuit Court. But that that Court is bound to follow the *prior* decisions of said Court—so *establishing* said rule of property. That the other parties hereto, conspiring to take the benefit of said *fraudulent* judgment, so *obtained by fictions of law*, and *false* presumptions of fact; *known to them* all to be false, fictitious and fraudulent; and knowing that these complainants had *never* had *any trial* of the validity of said *releases*; applied to said Supreme Court to *deliver* said residue to them.

That these complainants hence ask an Injunction and Receiver herein.

That said testator left upward of $6,000,000 worth of property.

That he intended to give the principal part of it to institutions of learning.

That in trying to get it to said twenty colleges, he gave the residue—to Ritch, Bulkley and Vaughan, in trust *for them*.

That *Ritch advised the testator, of* Chapter 360 of the N. Y. laws of 1860.

That Mr. Fayerweather then made Memorandum No. 1—with, and *at* the time of, the execution of his will.

That Ritch then got him to make the *first* cod-

icil, giving the residue to him and Bulkley *absolutely*, by a *promise*, for himself and Bulkley, that he *would so get it* to *the twenty colleges*.

Prays that Vaughan *disclose* the contents of the *fourth*, or Butler codicil.

And that such effect may be given to it, as may be just and equitable.

Avers that he unlawfully *destroyed* it, as part of a plan *to coerce* and *oppress* complainants, as hereinafter set forth.

That said three men, or some of them—November 15th, 1890, got Mr. Fayerweather to make a *fifth* codicil, upon the *promise* to carry out his intentions as expressed *in the will*, save as modified by said memoranda, Nos. 1, 2 and 3. That, having *so* obtained said residue, Ritch, Bulkley and Vaughan *are trustees of it*, for these complainants.

That, *upon the withdrawal of* their objections, probate took place.

That *pending* the probate contest, said Ritch, Bulkley and Vaughan were under a *fiduciary* duty *to disclose* ALL facts, affecting the rights of these complainants to the said *residue*.

And *not* to set up any *adversary* proceedings.

Or to combine with others, to *coerce* them to release, for the benefit *of others*.

Or to set up *colorable* claims of right to the interest of complainants, in favor *of others*.

Or *to becloud the title of complainants*.

Or *to obstruct* them in recovering their *rights*.

Or to put them at *disadvantages*, in dealing with said three men, or other defendants; *by withholding* their interests.

Or *threatening them* with *litigation*, *duress of property* or *loss*, *in order to get* them to release.

Or to represent that any *illegal* trust was a valid *bar to* said rights of these complainants.

That said *fifth* codicil was made when the testator *was at the point of death.*

That he was *no longer rational; or of sound or disposing mind.*

That he *was not able to read said codicil.*

Or to understand its import.

That Vaughan excluded from said testator's presence ALL *interested in said residue; or who could check his domination over the testator's acts.*

He was unable to hear, or to see said codicil, or to sign it.

That the act was the act and will *of Vaughan.*

That *Vaughan used the hand of* said testator *to sign* said codicil.

That *the mental act was Vaughan's.*

That the decision, however, that said last codicil was invalid, would, so far as these complainants then knew, or had reason to know or believe, leave in force the *tenth* paragraph of the said will.

So that they would have *no* standing to attack the validity of said codicil.

That they were not then inhabitants of the State of New York; nor chargeable with knowledge of its laws.

That the effect, in such circumstances, of the devise or bequest by said testator, of *more than one-half his* estate to said 20 colleges, under the laws of said State, was a question resting in the judg-

ment of lawyers, learned in its laws; who were chargeable with the knowledge of such effect; and upon whose contentions, complainants *were entitled to* rely, under the circumstances, as equivalent to representations *of fact.*

That complainants did not know, and were not informed, that *they* had a clear *right to* share, as next-of-kin, in *one-half of said estate.*

That Ritch,—a New York lawyer,—and Bulkley and Vaughan, represented to complainants *by counsel, learned in said law,* that said rights *were unfounded.*

And that *they* had NO *claim* upon said estate, which they could enforce.

That said defendants *represented to* complainants that said three men *owned* said residue *absolutely, free from any secret trust;* and *threatened to withhold,* ALL their share in said estate; *and to prolong litigation; to defeat* their claims.

They falsely pretended that complainants had *no* right which they could enforce, or convey.

And, *that to buy peace,* and as an act *of grace, without any* duty towards, complainants, *they* would "*give*" the latter a snm, in fact equal to about one-eighth of the actual interest of complainants in said residue;—if they would make said *releases; withdraw* their objections to the probate of said codicils; and make no further contest, objections or claims.

That the said 20 colleges *combined with* said three men, to secure said *releases* upon said *mis*representations; and agreed to the payment of said one-eighth, out of the estate itself, in the hands of said three men, *to carry out the object of said conspiracy.*

That Complainants were *of scanty means, unable to* continue a contest at a distance from their domicile, and to judge of *the truth of* said representations.

They were not upon equal terms with said defendants; or with *other* claimants of said residue.

They were moved and induced by said *representations*, and by the advantage taken by said trustees, of their *superior knowledge* of said facts and laws, to execute said releases.

That they received for them, the *inadequate* sum of $42,500 each.

Whereas, each was entitled to uppards of $500,000 of said residue, *all of* which *was unknown to them*, and was *concealed from them by said defendants.*

That by reason thereof, said settlement and releases are fraudulent and void. And should be so adjudged; and said releases *cancelled.*

Complainants offer to *account;* and to do what is *equitable.*

They were not informed, *and did not know* said facts, as to said last codicil, until *after* the judgment of affirmance by said General Term about Dec. 31st, 1895.

That they then refrained from bringing this suit; *because* said action was pending; and of their *reasonable expectations* of amending; *and of a trial* of the issues *therein.*

That they alleged and charged that *said Surrogate's decrees are fraudulent and void; and should be set aside.*

That they should be *relieved* therefrom: and restored to *all* they have lost, by reason *thereof.*

That the Court, in this case, should, in lieu

thereof, *establish* the *true* last will; or *in lieu of any such*, should compel the payment and distribution of said estate, *according to law*.

That they further charge that *said judgment is a cloud upon their title*, to recover from said three men, as trustees *in their own wrong*, and by operation of law, their proportionate shares of said residue.

That said judgment is inoperative and *void, for matter not apparent upon its face*, as against complainants; because it was *not responsive to the allegations and proofs* before said Court.

And *because* said essential and *material* issues *were not determined* therein; through *no* fault on *their* part; or lack of due diligence, and compliance with the legal conditions, upon which they were so entitled.

That said judgment was rendered upon *fictions* and inferences as to *material* issues, as aforesaid: *contrary to the truth and the record.*

That said *judgment is fraudulent; against the law of the land; beyond the jurisdiction of said Court;* AND VIOLATES THEIR RIGHT TO DUE PROCESS OF LAW; SECURED TO THEM BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

And is *contrary to equity and good conscience.*

That it is *not* sufficient to bar complainants *from an adjudication of* the issues, *so* raised in their said *answer* in said action.

And from an adjudication and decree *herein*,

that said residue *is held* by said three men, *in trust for the benefit and use of these* complainants to the extent of their respective and distributive shares thereof.

And for an *accounting* and payment thereof; for which they pray.

That by virtue of the premises, complainants are entitled, as heirs-at-law of said testator, to recover from said three men, and from such other defendants as have received any part thereof, *their share of said residue.*

And to have said releases adjudged *void.*

For all of which special, as well as for *general* relief, they *pray.*

And for an Injunction and a Receiver.

All Demurrers were Overruled by Wheeler, J.

(I, 73-82) The following defendants *demurred to* said bill of complaint, namely: Ritch, Bulkley and Vaughan, Union Theological Seminary & Dartmouth, Amherst, Williams, Yale, Columbia, Cornell & Rochester, Lafayette, Marietta and Adelbert Colleges.

Bulkley and Vaughan, in their demurrer, claim that said bill does not state facts sufficient to constitute a cause of action.

That this Court has no jurisdiction of the subject of the action.

All other demurrants state the same grounds.

Bulkley and Vaughan also claim that said bill against them, and other defendants, is for distinct and independent matters, not related to each other, and in which, or the greater part of which, said

two men are not concerned, and should not be implicated.

Ritch alleges laches *in addition to* the last ground.

Said Circuit Court, by WHEELER J., *overruled all* of said demurrers.

Opinion of Wheeler, J., Overruling Demurrers.

(I, 89) In his opinion Judge *Wheeler* says that

> " The statute does not seem to require that " an issue of fact in a case should be tried be- " fore decision, unless the appeal is upon a " case containing exceptions.
>
> " And *this* judgment *may have been* prop- " erly affirmed, *without* trying the issue as *to* " those *releases; and thereby room has been* " *left* under the law; for the judgment or de- " cree to have been rendered; and *still* these " allegations *be true.*"

(I, 90) After citing from the decision of the N. Y. Court of Appeals, he continues, thus:

> " As that case is made to appear from the " allegations of the bill, as admitted by the " demurrer, the judgment or decree *was en-* " *tered, without* the issue as to the *validity* " of the releases *having been, by either of the* " *Courts, at any time, tried* and *determined,* " upon evidence, as a matter of fact.
>
> " *That judgment of decree* was *not* against " *these plaintiffs* for the recovery *of money or* " *property.*

"But *was* against *Ritch, Bulkley and* "*Vaughan*, for *such* a recovery *of them;* "where the rights of the plaintiff *were only* "*collateral.* And *that* recovery, upon the "case as made to appear, *did not so necessa-* "*rily involve* the decision and *determination* "of this *collateral* issue, as such a recovery of "money or property *from these plaintiffs* "*themselves*, would.

"A *general* finding and judgment against a "party for the recovery of money, or of prop- "erty, seems to draw into it and conclude, all "questions which might arise in determining "the right of recovery against that party.

"But when an *outside* or *collateral* issue is "involved, to make the decision upon *that* "conclusive—*it should appear* that *this very* "question, *was* involved, *and actually decided*, "somewhere in the proceedings. (Cromwell *v.* "County of Sac., 94 U. S., 351).

"An inspection of the proceedings, such as has "been afforded, and had, and as they must be "viewed on this *demurrer*, *fails entirely to show* "that *the issue of fraud* in the execution of "the *releases*, *was*—by *either* of the courts, in "which the proceedings were pending, in *any* "*wise tried and determined.* It does not appear "to be claimed here that such issue is shown to "have been tried, in *any other* way than as the "determination of the issues in favor, of the "plaintiffs there, *would draw into* them—the "determination of *all* of the rights of these "plaintiffs here, as they were made, and be- "came defendants there.

"It is said that the judgment was the same as

" if upon a *general* verdict against these plain-
" tiffs. And that it *involves* the determination
" of those issues, as to these plaintiffs here, as
" defendants there ; as well as against, the de-
" fendants Ritch, Bulkley and Vaughan, de-
" fendants there, as executors and trustees.

" *That* suit was *not* however, *an interpleader*,
" by Ritch, Bulkley and Vaughan—according
" to the course of equity-procedure ; where the
" claimants would be brought in, and required
" to litigate their claims between themselves
" respectively.

" But *was* for the *recovery of property*, of
" *those* defendants ONLY. And the rights of
" *these* plaintiffs *were only collaterally involved*,
" as a defense, excluding the rights of the plain-
" tiffs there, in the determination of the case
" against the defendants there, of whom a
" recovery was sought.

" *This* issue, *only so involved*, would *not*
" seem to be conclusive, upon the rights of the
" plaintiffs ; *unless* the proceedings should
" show *clearly* that it *was in fact tried*.

" As the proceedings, in the light of the alle-
" gations concerning them, do *not* so show,
" these plaintiffs do NOT appear *now to be con-*
" *cluded by that judgment*.

" Again, the plaintiffs would *not* be so con-
" cluded *unless* they had *an opportunity to*
" *try* the issue, upon which their *rights* de-
" pended, in a proceeding *which would*
" *amount*, as instituted and carried forward,
" *to due process of law*.

" If the case had been tried, as it is alleged
" to have been tried, *without* allowing an an-

"swer, by these plaintiffs, setting forth their "rights, and an opportunity to bring evidence "to support it—probably *no one* would now "claim that they were concluded by the judg- "ment.

"Hovey v. Elliott, 167 U. S., 409.

"As the proceedings went forward, the "Special Term decided the case *upon a ground* "which did *not* involve the *determination* "*of this issue of fraud in the procurement of* "*the releases.*"

"AND THAT COURT APPEARS NOT TO HAVE, "IN ANY WAY, PASSED IN ANY MANNER, UPON "THE QUESTION."

"The General Term is alleged to have de- "cided the case upon *other* grounds, *without* "any finding upon *that* question; and this "allegation is admitted by the demurrer.

"The Court of Appeals appears merely to "have affirmed the decision of the General "Term, upon matters *of law only.* This al- "leged course of proceeding, which must be "taken to be that, had *left these plaintiffs* "*without any opportunity to have this ques-* "*tion tried in either Court.*

"If the course of procedure, CUT OFF THE "RIGHT TO TRY THE QUESTION, RAISED BY THE "ANSWER, IT WOULD BE AS MUCH SHORT OF DUE "PROCESS OF LAW, AS THE DECISION OF A CASE "INVOLVING SUCH A QUESTION, WITHOUT AL- "LOWING AN ANSWER, WOULD BE.

Demurrer overruled."

(1. 94.) August 10, 1898.—Decree of Wheeler, J., was entered, *overruling* said demurrers with costs, and allowing said defendants to *answer*.

Injunction Granted by Lacombe, J.

(1. 96.) August 29, 1898.—Motion for Preliminary Injunction was granted by Lacombe, J.

(1. 98.) September 7, 1898.—An injunction was issued by Lacombe, J., against Ritch, Bulkley, and Vaughan, and all of the 20 colleges, save Lincoln, from disposing of, spending in litigation, or paying over, *all or any of* said *residuary* estate, until final hearing, and until the further order of the Court.

(1. 103.) January 7, 1899.—The U. S. Circuit Court of Appeals reversed said Injunction Order.

In their opinion, by Wallace, J., and Shipman, J. (1. p. 103), they say:

> "The *theory of* the present suit, as set
> "forth in the bill, is that the complain-
> "ants *have never been heard upon* the
> "*question* of the *validity of* their *releases;*
> "consequently, that the judgment of the *State*
> "court *is not a bar* as to *that* question; and
> "any adjudication *to that effect* by either of
> "the State courts, adversely to them, is void,
> "as *contrary to due process of law.*
>
> "By *whatever process of reasoning* the re-

"sult was reached, it is plain that, by the "judgment of the State court *it has been* de- "termined that the *fund* now in controversy "equitably *vested in* the various corporations "made legatees by the *ninth* clause of the will, "and *did not*, as to any part of it, belong to "the complainants; and that determination "was reached in an action, between the same "parties now present, brought to settle the "ultimate rights of each to the fund. As the "present suit is brought to determine the rights "of the same parties to the same fund, "*we are unable to doubt* that the former judg- "ment is *an estoppel and a finality*, not only "as to every matter which was offered and re- "ceived, to sustain or defeat the respective "claims of the parties to the fund; but also "as to any other admissible matter which "*might have been offered* for that purpose. "It suffices to refer to Cromwell *vs.* Sac. Co., "94 U. S. 351, as a complete exposition of the "doctrine of estoppel, so far as pertinent to "the present case."

After quoting from Stout *v.* Lye, 103 U. S.. 66, Judge WALLACE continues thus (I. 104):

"So, in *this* case; the claims of the respect- "ive parties to the fund in controversy, have "passed into judgment; and the right of the "parties cannot be re-litigated, upon the basis "of any title which they had, but did not "litigate." * * *

He then cites from Dowell *v.* Applegate, 152 U. S., 327, and concludes his opinion as follows * * *:

"In this case the *fundamental* question in

" the former suit *was*, whether the parties,
" other than the present complainants, or the
" latter, were the *equitable* owners of the fund
" in controversy. Moreover, *one of the issues*
" *presented* for trial in the former action was,
" whether the *releases*, given by the complain-
" ants, were operative upon the rights or in-
" terests of the several parties in the fund.
" The plaintiff *set them forth* in the *complaint*
" as affecting the rights of the parties. The
" present complainants alleged in their *answers*
" that they were *void;* and evidence touching
" the circumstances of their execution *was*
" *introduced. That issue was consequently in*
" *litigation.* If the trial Court had as-
" sumed to pass upon the question of the valid-
" ity of the releases, and had decided it erro-
" neously,—either upon a misconception of the
" law or of the evidence—it is entirely plain that
" the adjudication, so long as unreversed,
" would have been final; and that question
" could not have been re-opened, in any subse-
" quent litigation between the same parties.
" The trial Court held that the releases *were*
" *without effect* on the *rights* of the parties;
" and, even though that decision was errone-
" ous, it was final between the parties, until
" reversal; and if it be assumed that the opin-
" ions of the appellate courts should be treated
" as a reversal of that decision; and that both
" of these courts *erroneously* held the releases
" to be valid, these determinations are final be-
" tween the parties upon *that* question. *The*
" *complainants have had their day in court,*
" before tribunals having jurisdiction to settle
" their rights, and EVEN IF THERE HAS BEEN A

"MISCARRIAGE OF JUSTICE THEY MUST SUB-
"MIT.

"*Interest Reipublicæ ut sit finis litium.*

"*The proposition* that their rights have been "disposed of, *without* due process of law, *is* "*too preposterous to merit discussion. They* "*have had a trial*, according to the *settled* "course of judicial proceedings. *They* "*have been heard, and heard ad libitum*, "though without avail.

"In granting the order for a preliminary in-"junction, the court below was mainly influ-"enced by the decision of Judge Wheeler, ren-"dered upon a demurrer to the complainants' "bill. 88 Fed., 713. It is altogether probable "that, if all the facts which appear in the "present record had been before the learned "judge, who decided the 'demurrer', *he* would "*not* have reached the conclusion that the "former adjudication *was not a bar* to the "present suit.

"However that may be, inasmuch *as we are* "*satisfied* that the complainants cannot ulti-"mately prevail, upon the case made by the "bill, we conclude that they are not entitled "to preliminary relief. The order is accord-"ing reversed."

Defendants swore that the Trial Court Justice Truax HAD considered and decided as to the validity of the releases.

In the *affidavits* of defendants, in support of said motion to reverse said injunction, *they swore*, as in their pleas, in substance and effect, that the trial

Court—Justice Truax—HAD *considered and decided the question* as to the *validity* of the releases.

Plea of Hamilton College.

September 16, 1893. Hamilton College filed a *plea* to said bill of complaint; and proceeded to take proofs thereunder (Vol. I, 350, 631 inclusive).

(I, 229.) August 7th, 1899. Hamilton *elected to* stand upon said plea and said proof, as her plea to the *amended* bill herein.

Bill How Amended.

The original bill was *amended* as follows, namely:

(IV, 623.) By inserting in the prayer for relief thereof after the words "charge and allege that" upon page 22 (Complainants' Pleadings, &c., for final hearing, &c.), as follows, namely:

"The *decree of the Surrogates of* the County
"of New York, whereby said testamentary
"papers were admitted to probate, are, and
"each of them is, *fraudulent, null and void,*
"*and should be set aside*, and altogether held
"*for naught*;
"and that they should be relieved therefrom,
"and restored to all that they have lost by
"reason thereof;
"and that your Honor should in lieu thereof,
"*establish* and compel due performance of the
"*true* and lawful last will and testament of
"said Daniel B. Fayerweather;
"or, in lieu of any such, compel the payment
"and distribution of the estate of said Daniel
"B. Fayerweather, *according to law*;

"And complainants further charge and allege
"that the said :"
"11.—By inserting the word 'not' *before*
"'competent,'" and *after* the word 'was'
"(Vol. 1, at page 8, folio 15), of said bill.
"By striking out the word 'but' in folio 25,
"and inserting in its place 'and.'"

Contents of Plea and Answer of Hamilton College to the Amended Bill.

(1. 176.) Said plea of Hamilton alleges in substance as follows:

The suit of Amherst, etc., *et al. v.* Ritch *et al.*
The contents of this complaint;
And of the answer of the widow, and next-of-kin, therein.

That the issues raised by said answer, *including* the issue as to the *validity* of said releases and settlement, were *the same* as those of the bill of complaint herein (I. 180). That *the same* WERE *duly heard and considered by the Trial Court Justice Truax;* that the questions of facts and law *so presented, were duly argued before him, and considered by him;* and, upon the issues *so* presented, that he decided in favor of the twenty colleges.

That the General Term duly heard the appeal therefrom, upon a case containing exceptions.
And considered and decided the same.
That *it had* jurisdiction (I. 182) and it was its duty; and the complainants herein asserted that it so had jurisdiction, and that it was its duty, to review and decide all questions of law and fact, in-

volved in said action; and to hold said releases invalid.

That it *did* so decide, and hold.

That, upon appeal, counsel for said complainants contended that the N. Y. Court of Appeals should modify the judgment of said General Term by setting aside said settlement and releases, as inequitable and fraudulent; and by awarding said residue to the complainants, and to this cross complainant herein.

That said Court of Appeals held that no error had been committed; and affirmed said judgment of the General Term.

March, 1897, that *a motion to amend its remittitur*, by directing Justice Truax to consider and decide, as to said *settlement* and *releases*, was denied.

That a *reference* was then made (to Hon. Charles W. Dayton), as Referee, to *take and state the accounts;* and to report thereon.

That his report was duly confirmed.

That July 6th, 1897, *final judgment* was entered upon said *remittitur* in the N. Y. Supreme Court, directing Ritch, Bulkley and Vaughan to distribute said residue, *among the said 20 colleges.*

That said defendant, *for answer*, to said bill or to *so much and to such part thereof, as this defendant is advised it is in anywise material or necessary for it to make answer unto, answering saith;*

that said defendant *denies* that defendants, or any of them, *requested* said Supreme Court to hold or decide that the right of the parties in said action, to said residue, *did not require any consideration or decision* of the *issues* tendered in said action, by the complainants herein; it denies that the said Court made its decision, *without* considering, or including in its judgment, said *issues;* or *omitted to* decide upon the rights of these complainants to the affirmative relief prayed in their answer in said action, as to said *releases.*

It *denies* that it was *the duty of* said General Term to require that the said issues *should be, in fact, considered, passed upon, or included in judgment,* by said *Trial*-Court;

Or that said General Term, by any *fictions, imputed to* said Trial Term that it *had* decided said issues in favor of said 20 colleges, contrary to the truth;

Or that said General Term *pretended to adjudge,* that there was *not* sufficient preponderance of evidence to support the invalidity of said releases, to render such imputed determination of said Trial Court *erroneous,* as matter of law;

Or that such determination *was* supported by evidence sufficient to relieve it from error.

It *denies* that said General Term did *not* exercise *original* jurisdiction; and adjudged said issues.

Or that it confined its action *wholly to errors* in the record.

It denies that the N. Y. Court of Appeals decided that these complainants had *no* standing to be heard in said action;

Or to have their rights determined by *said Court of Appeals.*

It *denies* that the judgment in said action is *fraudulent.*

Or that any defendant was committed *any* fraud as to it.

Pleas of Ritch, Buckley and Vaughan.

(1. 209.) The plea and and answer of said defendant Ritch was like that of defendant Marietta College to said amended bill.

And in *substance*, it is *a copy of* said plea of Hamilton, save that it adds (1, p. 202) that it was *not* competent for said General Term to have exercised original judgment to have adjudged said issues, and thereupon to have modified said judgment.

Said defendants Bulkley and Vaughan (1. 209) filed a *similar* plea and answer.

Each of the twenty colleges defendant filed a plea like one or the other of those just described.

Answer of John B. Reynolds as Executor. Its Contents.

(1. 224.) December 4th, 1901, this Cross complainant, John B. Reynolds, as sole executor of the will of said widow Lucy B. Fayerweather deceased, filed his *answer* to said bill, with *similar* averments *in substance*, as to said *probate;* as to the way in which letters testamentary were issued thereon; *as to the condition and circumstances of said testator* when said *last* codicil was made, when he was *at the point of death.*

That said widow *did not ever know*, in her lifetime, of the facts as stated respecting *said codicil.*

That her sole executor, this defendant, did *not* know then, until after 1894; and did not sue *then*, *because of* the pendency of Amherst *et al. v.* Ritch *et al.;* and the *reasonable* expection of the trial of the issues *therein.*

That said Widow's estate is entitled to, and should receive *one-half of* said residue.

And for Injunction.

The Cross-Bill. (1. 262.) **Its Contents.**

Said Cross-Complainant filed his Cross-Bill herein, averring

That the *object* of said *bill* was to secure payment to complainants, to your orator and others, upon grounds therein stated, of *said residue;*

And a decree *cancelling said releases;*

And avoiding said *Surrogate's probate decrees;*

And said Supreme Court *judgments;*

As colorable cloud upon the title of complainants, and of this cross-complainant to said *residue.*

All of which relief is in said bill prayed.

That its grounds are not set forth *so* truly and *entirely* in the Bill, and the *relief* it demands is not *so* alleged as to entitle this cross complainant to *such* relief by answer thereto, as he can obtain by *cross-bill;* and that he is entitled to relief between himself and other defendants herein, as hereinafter set forth.

That *only* by decree *on his Cross bill* can he obtain *said* relief.

That *the Probate decrees were obtained by fraud. And by intimidation, duress, snppression of the truth, misrepresentation, abuse of position, power*

and opportunity hereinafter set forth, *practiced upon said widow. Whereby* and *in pursuance of which, without* ANY *consideration*, she was induced *to consent to said probate;* and *so* said decrees *were obtained by defendants.*

That Ritch and Vaughan, before said probate, pretended to her that said will of 1884, which named *them* as executors, was the *last* will of her said husband; that it must be probated at once to *enable her to live.*

That she, *not knowing that it was not the last will*, but that the will of October 2, 1880, naming only Bulkley executor, and *not* Ritch and Vaughan, was his *true last* will *consented to probate.*

She, however, *duly objected* to said probate of said alleged will, and of four codicils to it for various reasons. Whereupon Ritch, Bulkley and Vaughan *withheld from her the necessities of life*; and the provision her husband had made for her maintenance and comfort;

and *compelled her to live* upon *borrowed money*, and upon *credit*;

threatening meanwhile *to withhold* said provision;

and to *expend* said *entire estate in litigation unless she* should *cease* her contest,

and should *release.*

That said three men *represented to her* that *they* owned said residue *absolutely;*

and *denied* that *she* owned *any right or interest in it.*

That, suffering from mortal disease, as they knew, and her judgment and resolution impaired, her dis-

tress of mind was so great that, by reason of the premises, *she was coerced and intimidated into* releasing and *withdrawing her opposition to* said *probate.*

That she *never* knew the facts hereinafter stated as to either of said wills.

That as *part consideration* to get her to so *release*, said three men *agreed to convey to her, her husband's burial plot* in Woodlawn Cemetery, in New York.

But that, in violation of their said agreement, they conveyed it *to Lucy J. Beardsley*, which *invalidated* her said *settlement*, agreement and *release.*

That said will of October 6, 1884, was *void*, and its execution was procured by *undue* influence, covin, and *fraud*, upon said testator by said Ritch, *in this:* That he, an attorney, *enjoying his confidence*, persuaded him *to violate* Chap. 360 of 1860;

and to make *him* an executor, with *a* "*discretion*" in disposing of his estate, *that would enable him* to *coerce* the *beneficiaries to acquiesce in* such disposition thereof, as said *Ritch* should *determine upon.* Which *was* done.

That further so contriving, said Ritch persuaded him, by a said *first* codicil, to make HIM a legatee *of said residue;*

that, by these devises and papers, *Ritch* was empowered, *by using* said *discretion*, to throw *the bulk of* said estate into the *residue;*

and, by force of said *first* codicil, *to become*, with Bulkley, *owner of nearly* the *entire* estate,

That said testator *did not intend* to make any *such* will. He made it, and its first three codicils, NOT *knowing* their legal effect;

and *relying upon Ritch's* advice, as his attorney, that said "discretion" would effectuate his wishes aforesaid, in violation of said statute;

whereby that *violation* could be *concealed;*

and the statute successfully *evaded.*

But, while, seeking *to so avoid it, he was himself defrauded by Ritch*, inasmuch as *he Ritch knew that* said testator did not know that said "discretion" *was void for uncertainty, and otherwise.*

That said devise *enabled Ritch* to claim said *residue as his own.*

That when said testator, a few days before his death, *discovered* the *effect of* said last will and its codicil, he tried *to annul it* wherever it differed from said will *of 1880;* and tried *to establish* the *latter.*

And *to divest Ritch of all control or discretion over* said estate;

and *removed* him as executor.

It prays that Vaughan, who has the codicil that *did* this, *disclose* its contents;

and, so far as valid, that *they* be *effectuated.*

That, while said testator was *dying*, Ritch and Vaughan induced their agents and employes *to enter the dying chamber of* said testator;

to place a pen in his hand;

to *support and guide it;*

to place his name, which was *misspelled*, upon a pretended codicil ;

which purported to affirm said will of 1884, its *first three* codicils ;

but *not* said fourth one, *retained by* Vaughan ;

And to join Vaughan *as a residuary legatee.*

That this paper was *not* the will of said testator.

That he *was unable to*, and did *not*, understand it.

That, while it was being so executed, *Vaughan excluded said widow* from *the room*, where said testator was dying ;

and suppressed *from her*, and from complainants, *all knowledge of* what was so being done.

That said probate decrees constitute the *only* title or color to said estate, in *any* way, of Ritch Bulkley and Vaughan.

That her said *agreement to* release, and her said *release, wore procured by said fraud, duress and intimidation.* Were *without* consideration ;

And that there has been *a substantial failure of* the pretended *consideration.*

That said papers should therefore be declared *void*, and cancelled.

That said *Probate Decrees were obtained by fraud*, as aforesaid.

That the proof taken to support them was *false ;* and that Ritch and Vaughan *knew* that it was.

That they well knew that certain proofs of facts herein, in that behalf alleged, were, *by them*, actively *suppressed ;*

Which would have *defeated* said probate ;

And that, *without* said *acquiescence*, and said pa-

pers, used by them *to prevent* a *contest*, and due presentation of full proof, *said decrees would not have been rendered.*

That thereby said Surrogate was induced to believe and decide that said will *of 1884*,—and said *death-bed* codicil,—were the *last valid* testamentary papers of said testator.

And that *the fact*, and the proof thereof, *to the contrary* hereinbefore alleged, *were suppressed.*

And were *not* adduced in, to, or *before said Surrogate.*

That the existence of said 1880 will *was unknown to* Cross-Complainant *until about February 5th, 1894.*

That the facts here charged as to *it*, were *not* known to him *until more recently.*

That meanwhile, there has been *other* litigation between the parties hereto, which he was justified in believing, and *did* believe, *precluded* instituting any suit for the relief herein prayed.

He prays that the 1880 will is the *last* will of said testator.

That said *Probate decrees were obtained by fraud;* and are *void*, with all proceedings thereupon, or thereunder.

That said 1884 will, and said four codicils are uncertain;

against public policy;

were obtained by undue influence and *fraud;* and are *void.*

That by legal effect of said 1880 will, its provision, as *to one-half of* the estate, *violates* the statute; that to *that* extent, the estate passed at said testator's death, *to his said widow and next-of-kin* under the statute of *descent* and *distribution.*

That the legal title to said *entire* estate passed by said will of 1880 to *its* executors, and their legal successors, who are entitled to the whole of it, subject to the valid trusts therein;
and to said rights of said widow and next-of-kin.

That Ritch, Balkley, and Vaughan *account for* all that has come into their hands; and *pay over* such sums as appear to be due from them to the executors of *said 1880 will*. Or in *such* manner as may be *equitable; or the Court may direct.*

That such *other* defendants as have had *any* part of said estate, to which they are *not* entitled, account for, and pay it over, in *like* manner.

That said settlement and release be declared *void;* and *cancelled.*

That complainants and this cross-complainant *receive their shares* of said estate.

For an Injunction and a Receiver.

And for general relief.

That this cause may be heard and decided, with the aforesaid cause upon the Bill.

Pleas of the Other Defendants.

Pleas substantially similar were also filed by Ritch, Balkley and Vaughan, and by said twenty colleges, to the *cross* Bill ( ).

Pleas Sustained by Lacombe, J., "Under Constraint".

Hearing was had upon said Plea of Hamilton to the amended bill and said Plea was sustained

(I, 259) July 12th, 1901. Judge Lacombe, in sustaining various pleas to the Amended and Cross-bill, filed an opinion.

(Whether he sustained said pleas *upon his own judgment*, or not, appears from said opinion.)

It reads thus (I, 259):

AN OPINION UNDER CONSTRAINT.

Opinion of Lacombe (J.) Sustaining the Pleas.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER and MARY W. ACHTER *vs.* THE TRUSTEES OF HAMILTON COLLEGE, THE EXECUTORS OF DANIEL B. FAYERWEATHER, impleaded, with others.	**In Equity. No. 6675.**

"Careful examination of the ingenious and "exhaustive brief; submitted in support of the "bill and cross-bill, has failed to convince the "Court, so far as the merits of the controversy "presented by these pleadings are concerned, "the pleas are not sound, and supported "by the proofs.

"IT IS CONSTRAINED TO SO HOLD, BY "THE DECISION OF THE CIRCUIT COURT OF AP- "PEALS, upon appeal from the order of injunc- "tion.

"*It may be difficult to follow the reasoning by* "*which that* court *reached* the conclusion, that "there *had been* an adjudication, sustaining the "proposition that the releases executed by the "widow and next of kin were valid, and *not* "procured by fraud.

"*But that conclusion was certainly* "*reached :*

"*and was expressed with no uncertain* "*sound.*

"NO DOUBT THE ULTIMATE RESULT OF THE "LITIGATION IN THE STATE COURTS HAS BEEN, "BY REFINED TECHNICALITIES, TO RENDER IN- "OPERATIVE, SO FAR AS THIS ESTATE IS CON- "CERNED, THE PROVISIONS OF A STATUTE "WHICH SEEMS TO BE THE CONCEPTION OF A "WISE AND COMMENDABLE PUBLIC POLICY.

"*That* CIRCUMSTANCE, HOWEVER, *is im-* "*material.*

"AS THE *Court of Appeals* EXPRESSES IT, "'*Even if* THERE *had* BEEN *a miscarriage of* "'*justice* (THE PARTIES) *must submit.*'

"Since the former appeal the complaint has "been amended, and a cross bill served, "whereby relief is sought, not only to impugn "the probate of the will and its codicils so far "as they were admitted to probate ;

"but also to establish a *codicil*, alleged to

" have been unlawfully *destroyed;* and if no " valid will can be established, to administer " and dispose of the estate, as in case *of in-* " *testacy.*

" *But this does not in any way change the* " *situation.*

" The releases bear date subsequent to the " transactions on which this prayer for relief " is predicated, and, IF VALID, are a fatal bar " to any part of the relief asked for. Whether " the adjudication in the State Court would " or would not be *a bar to* relief to the addi- " tional matter charged in the Amended bill " and in the cross bill, the release is *as* effect- " ual a bar to the new matter as it was to the " old matter set up in the bill as it stood, on " appeal to the Court of Appeals.

" The plea does not set up the release in " bar; but it does set up the *proceedings in* " the State Court, *which the Circuit Court of* " *Appeals has held* to constitute an adjudica- " tion that that particular relation was made, " *is valid, and no longer open to attack.*

" Both releases and adjudication are proved; " AND UNDER THE DECISION OF THE APPEAL " FROM INJUNCTION, THERE IS NOTHING TO DO, " *except sustain* the pleas, and dismiss the bill " and cross bill.

" Under *these* circumstances, the Court will " not be astute to find errors of *form in* the plea.

" The plea in this case is not double; it sets " up the record of but a single suit as an adjudi- " cation, although the decisions of the court of " *original* jurisdiction and of the successive ap- " pellate tribunals are disposed of, that suit to- " gether makes up the adjudication on which " the defendant relies.

"As to lack of a corporate seal to the plea, the "language of the Equity rule 31, requires that a "plea 'be supported by the affidavit of the de- "fendant that it is not interposed for delay, and "that it is true in point of fact.' This require- "ment seems to be comprehensive, and when the "plea of a corporation is thus verified, the af- "fixing of its corporate seal to the plea may be "dispensed with."

"Filed July 12, 1901.

(I, 232-233) *General* Replications were then duly filed to *all* pleas, to the amended bill and to the Cross Bill.

And proofs were taken thereunder.

Notwithstanding this opinion and decision—as counsel for Ritch, Bulkley and Vaughan, and those for the twenty colleges *steadily urged* upon the General Term; the Court of Appeals; and the United States Circuit Court of Appeals; that the Trial Court,—Justice Truax,—DID *consider, pass upon, and decide* as to *the releases*,—and that they were valid;

And, as the decision of each of said three tribunals *rested upon* the fact that he *did* so consider, pass upon, and decide; *and that he held* that they were *valid;*

It became of constantly growing importance, to find out whether he *did* so—or *not.*

But ONE person really KNEW.

Counsel for Complainants and Cross-Complainant herein therefore *asked him* if he would object to testifying what was the fact.

He came at once—without any hesitation.

(The Trial Court) Justice *Truax*, testified thus (Vol. II. p. 522):

The Trial Court—Justice TRUAX—*swears that* HE DID NOT *consider or decide as to the* VALIDITY *of the* RELEASES.

CHARLES H. TRUAX, called as a witness on behalf of the Complainant, being duly sworn, testified as follows:

Direct examination by Mr. Sherman:

"1 Q. You are a Justice of the Supreme "Court of the State of New York?

"A. Yes.

"Fol. 44, 2 Q. And you were such Justice in "December, 1894?

"A. Yes.

"3 Q. Did you hold the Special Term of that "Court, at which was tried the action entitled, "The Trustees of Amherst College and others "against Thomas G. Ritch and others?

"A. Yes.

"4 Q. In your opinion in that case, at page "1004 of the record of the Court of Appeals, "you used this language:

"The view that I have taken of the facts "and the law of this case *renders it unnecessary* "*for me to consider* the very interesting *ques-* "*tions* of law, propounded by the learned coun- "sel for the defendants, Reynolds, Achter "and Fayerweather."

"Is *that language in* the opinion *intended* "*to express the idea* that you did NOT *consider* "*and decide* either the law or the facts in re-

" lation to the *validity* of *the release?* * * *

" A. *I think that* THAT *should be* the view " above, or the *view* stated above, that I *had* " taken. Won't you repeat the question?

" (Question No. 4 repeated by sten- " ographer.)

" *The Witness.*—I *can tell* you what I *did* " mean by *that.*

" 5 Q. If you please.

" *Mr. Bovee.*—And we make the same ob- " jection to Judge Truax stating what he " meant.

" A. I can tell you what my present recol- " lection is of *what I did then mean.* * * *

" *The Witness.*—As I remember now, the " heirs, Reynolds and Achter and Fayer- " weather, sought to set aside certain *releases* " upon the ground that those releases had been " obtained from them by fraud or deceit; and " one of the principal claims that they made, " one of the principal evidences of fraud, was " the *gross inadequacy of the consideration.* " *Under my view* of the law they got $310,000 " for NOTHING. They did NOT HAVE *anything* " to release; and *not having anything to* re- " lease, they got *more* than they were entitled " to, when they got the $310,000; SO IT WAS " UNNECESSARY FOR ME TO CONSIDER, AS I " THOUGHT, ANY OF THE QUESTIONS PRO- " POUNDED BY THEM.

" 6 Q. The theory upon which the decision " proceeds is, is it not, that the claim set up " in the complaint by the Five Colleges as " to a secret trust, independent of a test- " mentary paper, was sustained by the evi-

"dence and was a valid truth in law as against "the Statute of Wills, and that, therefore, no "title ever passed from Mr. Fayerweather in "such a way as either to vest in the widow or "next of kin or to be divested by their "releases?

"F. 1047, Mr. Bovee.—Same objections.

"A. I thought they had NO interest in the "estate.

"Q. And for the reasons embodied in the "question substantially.

"Mr. Bovee—Same objection.

"A. For the reason that I have stated, BE- "CAUSE IT WENT EITHER UNDER THE DEED "OF TRUST OR THE WILL TO SOMEBODY ELSE. "That is PART OF IT went under the will.

"And another part of it went under the "secret agreement of the secret trust.

"* * * *The Witness.*—THE FACT OF IT IS "THAT I DID NOT SAY ANYTHING, IN MY "OPINION ABOUT THESE RELEASES.

"AND MY RECOLLECTION IS THAT I DID NOT "SAY ANYTHING, BECAUSE I DID NOT CON- "SIDER IT NECESSARY."

All Appellate Decisions were made BEFORE—and without knowing—that Justice Truax swore that he did NOT consider or decide as to the VALIDITY of the Releases.

(IV. 63-9) As the General Term decision was rendered December 30th, 1895; That of the Court of Appeals March (1. 103) 9, 1897; and that of the United States Circuit Court of Appeals January 7th 1899;

And as the testimony of Justice Truax, a witness called by Complainants and cross-complainants to support their applications to said pleas in the present suit, was given before Examiner Shields upon the 14th day of February, 1901—*two years AFTER* Judges Wallace and Shipman handed down their decision;

It will be seen that the General Term, the N. Y. Court of Appeals, and the United States Circuit Court of Appeals had *not* the advantage of *his* testimony,—hence of KNOWING whether he *did* consider, pass upon; and decide as to said validity,—or *not*.

It will also be seen whether *they* had *any* ground for *assuming* that he *did* do,—what he thus swears that he *did* NOT do.

The Final Decree.

(IV. 777.) October 10th, 1902 FINAL DECREE by Lacombe, J. (still "CONSTRAINED" by said decision of Judges Wallace and Shipman in the U. S. Circuit Court of Appeals) was entered upon the Amended Bill and Cross Bill; the pleas thereto; the replications to said pleas; and the proofs taken thereunder,

In which it was adjudged that the cause, alleged in said Bill and Cross-bill *was barred* by the adjudication in Amherst etc. *et al. v.* Ritch *et al.* That complainants and this cross-complainant, having objected to, and moved to strike out, *the record of said last named cause;*
and to disregard *its* judgment;
BECAUSE IT HAD DEPRIVED THEM OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW;

AND HAD DENIED TO THEM THE EQUAL PROTECTION OF THE LAWS WHEREBY SAID JUDGMENT IS VOID;

and complainants, having in their bill prayed, that said judgment be treated as *void*, for said reason; and all said contentions having been *overruled and denied;* and said judgment held valid as and for tho purposes alleged in said pleas;

and all objections of complainants and cross-complainant to evidence, orders and proceedings, in the record, at final hearing, having been overruled; The other defendants named having made default;

IT WAS ADJUDGED THAT said pleas to the Amended Bill, and to the Cross-Bill, *are sustained;* and that both said Bills *are dismissed.*

That the service of the subpœna upon Maryville, and Wabash Colleges, also the University of Virginia,—is dismissed.

That said Amended bill and Cross-bill are taken *as confessed* as against those defendants to whom this suit is not, by this order, or has not heretofore, *been dismissed*; or as to whom service of process has not been, or is not hereby, set aside.

And, "*That the question of costs is hereby reserved*, unless an appeal is taken from this decree.

And, in case of an appeal, it is left to the appellate Court for determination."

Appeals and Assignments of Error.

(IV, 839–856) Appeals were duly taken from said final decree, and Assignments of Error were duly filed.

October 12th, 1903. Both by said Complainants (IV, 784), and said Cross-Complainant (IV, 811).

They allege, in substance,

that *there is manifest error* in said final decree, *in its holding that* said U. S. Circuit Court *had no jurisdiction* to grant relief asked in said bill; which in effect, alleges that the property involved in said suit was claimed by *other* parties thereto, under and by virtue of *decrees* of probate, *obtained by false and fraudulent practices* upon the complainant:

And upon this cross-*complainant;*

And upon the Probate Court.

That the will and codicils so probated, were *not* the *last* will of said testator; but were *void*.

That the *1880 will* was the *last* will:

That Probate thereof *was prevented by fraud*, and contrivance, of parties to this suit;

That all dealings of the defendants with said estate *were based upon* said Probate; and upon said will so probated; that all said dealings, and all suits, in respect thereto were *void for fraud, in procuring said probate.*

That the claims of complainants, and of this cross-complainant, and the defenses of the other defendants, were affected by said allegations;

and were undermined by said 1880 will;

That full and equitable disposition of the suit could not be had, *but by considering* the matters alleged by complainants;

by nullifying said probate decree;

By establishing said will of 1880, as the *true* will;

and by *its* enforcement, as the basis of the rights of the parties as to the subject-matter of this suit.

In that said Circuit Court held that it had *no*

jurisdiction to grant the relief prayed for, so far as the will charged that probate was got by fraud;

and required defendants to answer said charge;

A decree that said probate was void;

or that defendants in a Probate Court, or other Court having Jurisdiction, *consent to vacating* said fraudulent decree. And to the entry of a decree, admitting said 1880 will to probate; and to do whatever was equitable.

In, that, by its final decree, having possession of the cause and jurisdiction of the parties, establishing an estoppel against Complainants and this Cross-Complainant, available in every other Court, and confirming defendants in their title;

It nevertheless decided that it had no jurisdiction to entertain said Amended Bill and Cross-Bill, and proofs adequate to impeach such title, possession and control.

In that it held *that it had no jurisdiction* to entertain a bill in any suit between adversary parties;

Upon a subject-matter *of general equity cognizance*; with the requisite diversity of citizenship;

To duly dispose of the equities;

where it became essential to hold a *probate*-decree void, for *fraud in obtaining* it; Or to *establish* a will, as the measure or test of right between the parties.

In that it held that it had no *power to establish* a will in an equity suit, with the requisite *diversity* of citizenship, and grounds therefor.

In that it held that a will can have *no* effect in said Court, in a suit *in equity* therein, in the State of New York, *unless* previously established by decree of a *Probate* Court.

In that it held that *it* had *no* jurisdiction of a will, without probate thereof in a *State* Court of Probate.

In that it held it could grant *no* relief, upon said Amended bill and cross-bill; as it could exercise no *probate* jurisdiction.

In that it held, that it could not consider any allegations, of either bill, because they prayed *establishment* of a will, in place of that probated,—which it had *no* power to decree;

Though the Probate Court, from a defect of power to bring the necessary parties before it, from lapse of time;

from having no jurisdiction to exercise equitable powers, or otherwise;

could not, or would not, entertain jurisdiction to deal with the facts in said bill alleged;

though *there was no adequate remedy of law*, or in any other Court.

In that it held that it had no jurisdiction to decree that complainants and cross-complainant were beneficiaries *of a trust*, under the *true* will of 1880, as to the *realty* affected.

And entitled to have a power of sale executed by the proper parties, to take, hold, and dispose of the *realty*, for the uses in said will, and for their benefit;

And to require defendants *to account;* and to otherwise effectuate such trust.

In that it held that, by the judgments of the N. Y. Supreme Courts, in Amherst, &c., *et al.*, *v.* Ritch, *et als.*—as an adjudication of the matters alleged in said bills, the State of New York *has not* DEPRIVED COMPLAINANTS AND CROSS-COMPLAIN-

ANT OF PROPERTY WITHOUT DUE PROCESS OF LAW; AND THAT THEREBY THEY HAVE NOT BEEN DENIED EQUAL PROTECTION OF THE LAWS.

In that said Court held that said judgments of the N. Y. Supreme Court were competent evidence herein against complainants and cross-complainant, of an adjudication of matters alleged in their bills; and overruled their objections that said judgment *deprived them of due process*, and *equal protection*.

In that it held that the judgments of the N. Y. Supreme Court at Trial Term and at General Term, and of the N. Y. Court of Appeals concluded the matters alleged in said Bills, and all of them.

In that it *admitted* the record upon appeal to the Court of Appeals, and upon the motion to amend the remittitur, under due objections thereto.

In that it allowed various questions referred to in said assignments, against the objections therein set forth, at length.

In that, upon final hearing, it did not treat the cause as one upon *bill*; *pleas*, which stood *for answer*; replication thereto, and proofs;

But as upon bill, *pleas*, replication and proof;

Then decided that the pleas were a bar to all matters set up in said bills; and dismissed them on the merits.

Whereas, *it should have held and disproved*.

And have awarded complainants and cross-complainant decrees upon said bills, *answers*, and replication *upon the merits*, sustaining the allegations and prayers of said bills, and that provided to effectuate them.

In that it should have held that defendants, by the form of their pleas, and by putting in evidence *at large, outside of* the issues presented by them, *overruled* their pleas; so bringing the cause properly before it for final hearing, *upon the merits.*

In that the decree should have been in favor of complainants; and cross complainant; and against defendants interposing pleas, upon the *truth of* their pleas.

And upon the *sufficiency* of their pleas.

In that it held that its decision to require Prescott Hall Butler to answer as to the contents of the fourth or "burned" codicil was reversed by the Circuit Court of Appeals; and was valid and binding upon it.

Whereas, said proceedings were unauthorized by law; and *without* jurisdiction.

In that it held that its decision that Butler was in contempt was effectually reversed by the mandate of the Circuit Court of Appeals on a writ of error sued out by Butler; inasmuch as said writ was void.

In that it overruled the objections to the introductions to the pleas of Hamilton, and those in like case with her, of the record in Amherst College *et al. v.* Ritch *et al.*, so far as it contained evidence of matters *outside* of the judgment-roll.

In that it overruled the contention by Complainants and Cross-complainant to said introduction, including the *briefs* of Complainants and Cross-complainant in said action.

As evidence *at large* in the cause;

Not responsive to the *issues*, made by the pleas;
Supporting a defense *not pleaded;*
And in not *overruling* said pleas, depriving defendants of the advantage of them; and in not holding that the record made a case upon a bill, *answer*, and replication.

In that it held that the issues presented by the amendment to the bill made *no* essential change, as against the pleas.

In that it held that *it was constrained to* its said *decree, against its own judgment*, by operation of a decision of a Circuit Court of Appeals, reversing the injunction order;
Rendered upon an interlocutory appeal;
upon affidavits; with *no* opportunity *to cross examine the* witnesses;
which decision also *assumed to overrule* the declared law in the case in favor of Complainants and cross complainant;
and its interlocutory decree thereon, overruling the demurrers; which decree was *not* before said Circuit Court of Appeals, for review;

Hence that it assumed, *beyond* its powers and practice, to *reverse* a solemn decision in favor of complainants and cross-complainant, upon the equity of said bills; which *it had no jurisdiction to do*, by *a direct* appeal. Wherein it *ignored* its duty, and that of said Circuit Court, to treat said judgment *upon demurrer, as the law of the case*, until directly reversed, upon appeal from a *final* decree;
And to conform all incidental features *thereto;* so that Complainants and cross-complainant had costs imposed upon said reversal;

and said decision *was no restraint upon* the power, or bar to the propriety of said decision by the Circuit Court; and to an award of a final decree, in favor of Complainants and cross-complainant, conforming to the express opinion of said Circuit Court, and of two of its Judges (Wheeler and Lacombe), that they were entitled to a decree *in their favor*.

In that Judge Lacombe decided that he was *not* required to follow *Judge Wheeler's* decision *on the demurrer;* although his *own convictions* were *unchanged;* and was "*constrained*" by a decision upon appeal from an *interlocutory* injunction order, made by him, *to overrule and disregard* said decree, overruling the demurrers.

In that it held that the matters adjudged in Amherst College *et at. v.* Ritch, *et al., were the same as* those presented by said Bills.

In that it held that the releases *were a bar* to said bills.

Upon allegations impeaching the capacity of the persons *to whom they ran.*

In that it held them *a bar* as to matters *impugning their good faith, only becoming known* to complainants and cross complainant AFTER said releases were executed.

Hence *hid from them* by the *fraud* of defendants, so that they were held *to bar* their rights, against the secret trust affecting the residue;

though it was concealed from them and *denied by* defendants *before*, and in the *very* act *of procuring* said releases.

In that it held said releases *were authorized*, or pursued the authority under which they *purport*

to have been executed. And held that, *by estoppel of* the judgment in Amherst *v.* Ritch *et al.*, the evidence therein of facts *before that unknown to* Complainants and cross-complainant, and *fraudulently concealed by defendants ;*

That Beardsley *had no authority* to sign said releases, *was corrupted by* defendants ;
and induced *to betray* the interests of Complainants and Cross-complainant, and to abuse his said authority, could have no effect herein.

In that it held that the allegations of the bills, and the proofs impeaching the probate of the will under which defendants claim, do not amount to, and were not based upon, *a new title*, or *newly-discovered evidence*; available here, notwithstanding any adjudication, of probate, or in Amherst *et al. v.* Ritch *et al.*

In that it held that, by the judgment in Amherst *et al. v.* Ritch *et el.*, the *validity* of the *releases*, as asserted by the pleas, and against the allegation of the bills, *had been adjudicated, considered, passed upon and sustained by the State Courts.*

In that it held that the releases *were valid*, and a bar.

In that it held that the complainants and cross-complainant were *not* entitled to have the 1880 will applied as the measure of right herein.

In that it held that the entire estate did not pass, as in case *of intestacy.*

In that it erred in rendering *any* decree save one,

overruling and *dis*proving the pleas; and awarding to Complainants and Cross-complainant the relief prayed for in their Bills.

Wherefore they *pray* that said decrees be held for naught, on account of *said* errors;

That they may be restored to all that they have lost by reason thereof;

That said Court be directed *to restore* their said bills; to award a final decree *in their favor* upon the *merits;*

To proceed thereon *according to equity ;*

And to render *such decree as this Court shall determine* to *be just* and in accordance *with equity* and good conscience.

Appeals Allowed.

Said assignments of Error having been duly filed ; and the Appeal to this Court having been otherwise perfected, on October 15th, 1903 (IV. 840-857) it was duly *allowed* by the Judge of said U. S. Circuit Court for the Southern District of New York, in the following words :

"The foregoing Appeal is hereby allowed October 15, 1903, for the review of the questions set forth in the Assignments of Error filed herewith, as well of jurisdiction *as otherwise.*

"E. Henry Lacombe,
U. S. Circuit Judge."

The Clerk of said Circuit Court, John A. Shields, Esq., then notified all parties to come and inspect said Record ; and allowed them about an entire

month in which to do so. All who cared to, did so ; the changes they suggested being duly made.

(I, 1-3) Thereafter and on or about the 18th day of December, 1903, a Transcript of said Record, and proceedings, upon which said Decrees were made, duly authenticated, was sent to the Clerk of the Supreme Court of the United States, at Washington, D. C., and its receipt was duly acknowledged by him.

Citations Issued.

(IV. 847-855) Citations to said defendants were duly issued, and served on or about October 17th, 1903, to appear before the Supreme Court of the United States, to be holden at Washington, D. C., Nov. 12, 1903 (IV. 865-872.)

Bonds Approved.

Oct. 15th, 1903 (IV. p. 877-881) The Bond upon said Appeal by said Complainants, and upon that by said Cross-complainant, were approved of Judge Lacombe, and duly filed with the Clerk of said U. S. Circuit Court of the United States for the Southern District of New York.

Appeals Served.

(IV. 839-845) A copy of said Appeal of Complainants and of its allowance (IV. 830-864) and of that of said Cross-complainant and its allowance, were duly served upon the defendants herein.

(IV. 875) Bond of Complainant's on appeal.

(IV. 877) Bond of Cross-Complainant's on appeal.

Facts Before the Testator's Death, upon which arise Questions as to the Residuary Devise and Bequest.

As already seen (p. 4, *ante*),
the personal bequests, and the devise to the widow, aggregated $291,600.

The *Eighth* Paragraph of the Will gave to Hospitals thus.

Presbyterian Hospital	$25,000
St. Luke's Hospital	25,000
Manhattan Eye and Ear Infirmary	25,000
Woman's Hospital	10,000
Mount Sinai Hospital	10,000
Aggregating	$95,000

The *ninth*
(Vol. V, *fols. 3575–81*), gave the following specific legacies to *educational* institutions, viz.: To

Bowdoin College, Brunswick, Maine	$100,000
Dartmouth College, Hanover, New Hampshire	100,000
Williams College, Williamstown, Mass.	100,000
Amherst College, Amherst, Mass.	100,000
Wesleyan University, Middletown, Conn.	100,000
Yale College, New Haven, Conn.	300,000
Columbia College, New York	200,000
Union Theological Seminary, New York.	50,000
Hamilton College, Clinton, N. Y.	100,000
University of Rochester, Rochester, N.Y.	100,000
Cornell University, Ithaca, N. Y.	200,000
Lafayette College, Easton, Pa.	50,000
Lincoln University, Lower Oxford, Pa.	100,000

University of Virginia, Charlotteville, Va.....	100,000
Hampton University, Hampton, Va.....	100,000
Maryville College, Maryville, Tenn.....	100,000
Marietta College, Marietta, Ohio.....	50,000
Adelbert College, Cleveland, Ohio.....	50,000
Wabash College, Crawfordsville, Indiana	50,000
Park College, Parkville, Missouri.....	50,000
Aggregating.....	$2,100,000

3.—The College Legacies. But Only Upon a Peculiar Condition.

These specific legacies were made *expressly* subject to the *limitation*, that, in case the condition and circumstances of *any* of said institutions should be so changed, that in the judgment *of the executors*, it would *not* be *expedient to* pay over all, or any, of said moneys to such institutions; *then the executors* were authorized and empowered, IN THE EXERCISE OF THEIR DISCRETION TO WITHHOLD, or reduce, said amounts; and, also, to the *further limitation*, that, if the estate should not be sufficient to pay all the legacies and bequests in said will provided, then those in the preceding clauses were to be first paid in full and those in the ninth clause were to be paid *pro rata* (Vol. V, *fols. 3575; 3580–1*).

4. The Residuary Bequest in the Will gives the residue also to the Twenty Colleges.

The tenth paragraph of said will gave

> " all the rest, residue and remainder of the
> " estate, real and personal of which I shall die
> " possessed, I give, devise and bequeath unto
> " my executors, to have and to hold the same
> " *in trust*, nevertheless, to sell and convert
> " into cash, and to divide the same *equally*
> " among the several corporations mentioned in
> " the *ninth* paragraph of this my will, *share*
> " *and share alike*" (V, *fols. 3581-2*).

The eleventh paragraph appointed his friends Justice L. Bulkley, merchant, and Thomas G. Ritch, lawyer of the city of New York, "*executors of this my will and trustees of my estate*", WITH POWER TO SELL AND CONVEY REAL ESTATE, EXCEPT THE HOUSE AND STABLE DEVISED TO HIS WIFE, AND TO DO ANY AND ALL ACTS, IN THEIR DISCRETION, EXPEDIENT, OR NECESSARY, TO THE FULL EXECUTION OF THE PROVISIONS OF SAID WILL, WITHOUT GIVING ANY BONDS OR OTHER SECURITY (Vol. V, *fols. 3582-4*).

(Memorandum No. 1, made *with* this Will, appears *ante*, page 11.)

The First Codicil Takes the Residue from the 20 Colleges and Gives it to Ritch,—the Draftsman of the Will,—and to Bulkley Absolutely.

The *first* codicil to said will, dated December 13, 1884, revoked the *tenth* clause of said will, and provided that

> " All the rest and residue of my estate, of
> " whatsoever character, and wheresoever situ-
> " ated, the same may be, of which I shall die
> " possessed, and remaining after the provis-
> " ions of the first nine paragraphs of my said
> " will have been duly complied with and
> " carried into effect, I give, devise and Be-
> " queath to Justus L. Bulkley, and Thomas
> " G. Ritch, named in the 11th paragraph of
> " my said will, to them and their heirs for-
> " ever " (V, fols. 3586–90).

Memorandum No. 2, made with this codicil, appears *ante*, page 12.

The Second Codicil Makes Vaughan a Co-Executor and Co-Trustee, but Not a Residuary Legatee.

A second codicil to said will, dated January 7th, 1888,

> " Appointed his friend Henry B. Vaughan,
> " of Elizabeth, New Jersey, an executor of his
> " will and trustee of his estate, additional to
> " Ritch and Bulkley, with the same powers
> " and authority and without giving any bonds
> " or other security. He did not, however, by

"this codicil, make Vaughan a residuary leg-
"atee or devisee" (V, fols. 3591-5).

THE THIRD CODICIL.

Gave his executors $5,000—to Purchase Lot in Woodlawn Cemetery, Increased the Annuity to Miss A. A. Joyce, from $1,000 to $4,000; the Legacies to Mary W. Achter and Emma S. Fayerweather (Drury) from $10,000 to $20,000 each. It also made certain specific Legacies to employees, servants and others not relatives, aggregating $11,600 (V, Fols. 3596-3602).

"Memorandum No. 3", accompanied this Codicil. It reads thus:

"Private Memorandum."

"Having made enquiries with regard
"to Hampton and Lincoln Universities, it is
"my judgment that the bequests to them
"*should be withheld.* I think the bequest to
"Cornell University *should not exceed* $100,-
"000. If the Northwestern University of
"Evanston, Illinois, is in a prosperous condi-
"tion, I should recommend that $100,000 be
"given to it. If the following persons are in
"my employ at the time of my death, I sug-
"gest that they receive the following sums:
"Rogers and Blake $500 each; Gould, Camp-
"bell and Stone $300 each, and Carpenter $250.
"Also James, who now opens and closes the

" store $100; John Dixon $200. I also wish " that $1,000 be given Miss Joyce, immediately " after my decease, in addition to the provis- " ion made for her by my will (V, 6., *fols. " 1160-71*).

When this memorandum was signed Ritch says that Mr. Fayerweather, speaking generally with regard to institutions, said to him in substance, that he and Bulkley must use their best judgment with regard to what camein to their hands (*V, fols. 1245-56; 1494-1501*).

Early in 1887, Mr. Fayerweather fell into a decline, gradually failing in health throughout that year and the next. Nov. 3d, 1890, he wrote to Ritch to bring him the balance of the copy of his will, and Ritch brought him copies of the second and third codicils (v, *fols. 1171-7*).

THE EVENTS OF MR. FAYERWEATHER'S LAST WEEK.

MONDAY, NOV. 10TH, 1890.

Vaughan Reads the Will, and First Three Codicils to the Testator. Discovers that He is Not a Residuary Legatee. His Opinion of Ritch. Goes to Another Lawyer. Has a Fourth Codicil Drawn and Executed. It took the Residue, He Says—from Ritch, and Bulkley. He can only Remember

Part of What it did With it—although he Retained it Himself. Then says that HE "Burned it". But NOT in the Testator's Presence (V. fols. 2768-7).

ITS CONTENTS TO THIS DAY, REMAIN UNDISCLOSED.

For some reason Mr. Fayerweather had become uneasy about his will.

(II, 547) Mrs. A. A. Joyce Reynolds testified thus:

"Mr. Vaughan was sent for to come to the "house, *to read the will.* Mr. Fayerweather "requested him."

(VI, 645) Vaughan testified thus:

"When *he sent for me to read the will, I* "presumed that he had *a purpose.* And I "waited to satisfy *myself* about the will, "irrespective of what *his* views were.

(P. 641)

"Q. Where *were* the will and codicils? A. "I think he took them from his pocket.

"Q. And *asked you* to read them? A. "Yes.

"Q. The Surrogate—Copies, Mr. Coudert? "Mr. Coudert—Yes.

"The Witness—I wish to be understood that "I did *not* see the *original* will for some days "*afterwards.*

"Q. Did you read them? A. Yes.

"Q. And then, for the first time, you dis- "covered that these two gentlemen were "*residuary legatees?* A. Yes.

P. 642. "I wanted to know *the reason of* "that. I suggested that I should be allowed "to see Mr. Ritch; and to know *why* that "form of will was adopted.

P. 643. "Q. And you understood that he "gave his full residuary estate to these two "men, didn't you? A. As an absolute gift? "yes, sir.

"Q. As an absolute gift, and *that* is what "you wanted to see Mr. Ritch about? A. "Yes, sir.

"Q. Couldn't *Mr. Fayerweather* explain it? "A. *He didn't.*

* * * P. 644. "Not to my satisfaction. "He said he *believed* his wishes would be "carried out.

"Q. And that is *all* the explanation he gave "you? A. Yes, sir. * * * Then I sug- "gested that I should go and see *another* law- "yer * * * about that clause. * * * I "wanted to know the reason of that.

"(VI, 647, Vaughan) Q. And then *he pre-* "*ferred* that you should see another lawyer, "as you said the first time? A. That is what "I remember * * *.

"P. 648. A. I wanted an explanation whether "that would carry out, what I believed to be "Mr. Fayerweather's wishes.

"Q. How did you know his wishes? A. As "I had talked with him generally; and I told "you before that he wished his money to go "*to institutions.*

"(Vaughan then testified that he went to his "own lawyers, Messrs Evarts, Choate and Bea- "man, and saw Mr. Prescott Hall Butler, of "that firm, about this matter.)

"(VI, P. 654, Vaughan) Q. Going back a "little prior to seeing Mr. Butler, did you talk "to Miss Joyce about this—Miss Amelia Joyce? "A. If I did, I don't recall it.

"Q. Do you remember saying to her. "That "man Ritch is a damned scoundrel?" A. I "don't.

"Q. Will you swear you *didn't?* A. *No sir.*

"P. 655. Q. You will *not* swear? A. *No.*

"P. 659. I may have expressed a bad opinion of Mr. Ritch".

"Q. Did you entertain one? A. *Yes.*

Mrs. A. A. Joyce Reynolds testified as to this interview thus. (II, 547 A. A. Joyce Reynolds).

"A. Mr. Vaughan came to the house, *to "read to* Mr. Fayerweather his will. And "after reading it, there was a great discussion "between Mr. Fayerweather and Mr. Vaughan, "relating to the contents of the will. * * *

"P. 548—A. I had previously written to Mr. "Ritch to bring the will to the house; and it "was in an envelope in Mr. Fayerweather's "pocket, hanging on the rack in his room.

"33 Q. Were you *present* at the discussion "between Mr. Fayerweather and Mr. Vaughan, "after the reading of the will? A. A part of "the time.

"34 Q. Will you state what you heard "them say, each to the other? A. I was in "an adjoining room, and I heard a great excitement between Mr. Fayerweather and Mr. "Vaughan.

"Mr. Vaughan was trying to make Mr. "Fayerweather understand the contents of his

"will, which he could not bring to mind;
"could not make up his mind *was so.*

"And Mr. Vaughan said to him—this I
"heard distinctly, as I came into the room—
"If you were to die to-day, those two executors
"would get more than half your fortune".

"And they had quite an argument about it,
"and some very, large, strong talk.

"35 Q. Well, I wish you would state every-
"thing that you heard on that subject, so far
"as you can recollect it. A. And Mr. Vaughan
"said 'This man Ritch has written this. And he
"and Mr. Bulkley will come into possession of
"half your property. *And I say this man,*
"*this Ritch, is a damned scoundrel.*'

"P. 549—36 Q. What response did Mr.
"Fayerweather make to that? A. He thought
"that Mr. Vaughan was mistaken. That it
"could not be possible.

"37 Q. What could not be possible? A.
"That this was so.

"38 Q. That the will was so? A. He said,
"'This is not the *original* will. I want to see
"the original will, and see if those statements
"are correct.'

"(II, 553)

"Q. Well, was anything said by Mr. Fayer-
"weather as to Mr. Ritch? You have testi-
"fied, I think, as to something said by Mr.
"Vaughan to Mr. Fayerweather. Now, was
"there anything said at that interview, by
"Mr. Fayerweather to Mr. Vaughan?

"*Mr. Blaikie.*—You mean at the stormy in-
"terview?

"*Mr. Sherman.*—Yes.

"A. I do not think I could say, in Mr. Fayer-
"weather's language, anything, although he
"said something to me afterwards, but not to
"Mr. Vaughan.

"71 Q. When first, after this interview, at
"which Mr. Vaughan read to Mr. Fayerweather
"the copy of his will, did Mr. Fayer-
"weather say anything in your hear-
"ing, about Mr. Ritch, and what did he say?
"When *first*, the question is, and what did he
"say? A. He said he had found something
"in his will, which reflected very much upon
"Mr. Ritch's integrity. Previous to this,
"when he had asked to see his will, and I ob-
"jected,—thinking it would disturb him, ob-
"jecting to him having anything to do with his
"will, because I supposed it was all right,—
"he said, 'I have heard lately of Mr. Ritch
"doing crooked things. And I do not want to
"find a mare's nest in my will'.

"And immediately after this—he said to me,
"'*I have found the mare's nest*'.

"72 Q. On these previous occasions, had
"any mention been made about Mr. Ritch, in
"connection with the Hoyt will, by Mr. Fayer-
"weather;—and, if so, what? A. Well, when
"I asked him why he employed Mr. Ritch; he
"said, because he had been Mr. Hoyt's law-
"yer; and they recommended him to him; and
"he had done some business for other gentle-
"men, and also for Mr. Vaughan. And that he
"had made a serious blunder; and he wanted
"to see if his will was all right."

"(VI, 662, Vaughan.) After Vaughan then
"had Butler prepare a draft of said pro-
"posed codicil, he continued thus:

"Q. What did you do with the *draft?* A. "My recollection is that I took it up, and "showed it to Mr. Fayerweather.

"Q. And that was the 10th? A. That was "on Monday afternoon. * * *

"(663.) And, as I remember it, what was "said there was for me to have the draft re-"duced to the form of a codicil. * * * I "saw Mr. Butler the next morning.

"Q. What did you say to him? A. To "have the codicil—I mean the draft of the "codicil—reduced to a draft—reduced to a "codicil, I mean.

"(VI, 664.) Q. What was the object for "which you had this codicil made—was it "to correct any defect in the other papers? "A. Well, it was *to change* the other "papers * * *

"Q. And was there any change required, "except with regard to that *residuary* clause? "A. I think *that* was the *only* change.

"* * * Q. He remedied the defect which "you or Mr. Fayerweather apprehended to "exist? A. Which I apprehended to exist.

"Q. Well, did Mr. Fayerweather have noth-"ing to say about it? A. *He had;* but I can-"not remember.

"Q. And was it a matter of interest to you, "or was it not—perhaps it was? A. I guess "it was more me, than Mr. Fayerweather. "* * *

"(VI. 666. Vaughan.) I made an appoint-"ment with Mr. Butler to go to the house; "from Mr. Butler I should say I went to Mr. "Fayerweather's house, and saw Miss Joyce. "* * * I made an arrangement for her to

"have—I think at her suggestion,—the two "doctors, and Miss Lizzie Joyce, for wit- "nesses.

"Q. At what time was Mr. Butler to come "up? A. I think it was twelve; but I ain't "sure of that."

"(VI, 668. Vaughan.) Q. They (the wit- "nesses, namely, Dr. Vedder, Dr. Wilcox, "and Miss Elizabeth R. Joyce) were all there, "and the paper was executed then. A. "Well, I wasn't in the room when it was exe- "cuted. * * *

"Q. Did you never see it after it was exe- "cuted? A. It was given to me after.

(VI. 668. Vaughan.)

"Q. Who gave it to you? A. Either Mr. "Fayerweather or Mr. Butler, one or the "other.

"And at that time, did you have the other "papers in your possession? A. I had the "*copies* of the will and the codicils.

"Q. Did you have the *original* will and the "codicils? A. I did not get *them* until *after-* "*wards*. This was Tuesday morning, you "know.

TUESDAY, November 11th, 1890.

"Q. Then on that morning the 11th, which "is Tuesday, you had the executed codicil of "the 11th: and copies of the will and copies "of the three other codicils. A. Yes. * * *

"Q. Is that the fact? A. Yes.

"Q. Now, Mr. Vaughan, you took that cod-
"icil of the 11th, and put it into your pocket?
"A. Yes.

"Q. Did you keep it there any time? A. I
"think I kept it there some time. I think I
"put it in the Safe Deposit Vault.

"Q. How long did you keep it in the Safe
"Deposit Vault? A. I cannot remember * * *

Contents of the Fourth or "BURNED" *Codicil.*

(VI. 669. Vaughan.) "A. It was a codicil
"to the will; and changed the will or changed
"a part, but how it changed it, the wording
"of the will, I cannot remember.

"Q. I don't ask you for the wording, tell
"me *how* it changed it? A. Well, it changed
"it. *It took the residuary legacy away from*
"*Mr. Bulkley and Mr. Ritch.*

"Q. Yes, and what did it *do* with it? A.
"I think it gave it according to the tenth
"paragraph of the will. I think that was it.

"Q. That is to say, *it restored the tenth*
"*paragraph to the will?* A. *I think that was*
"*the substance of it.*

"(VI. 672. Vaughan.) Q. Now, besides
"changing the tenth clause, the residuary
"clause, was there anything *else* in that codi-
"cil? A. Not that I remember.

"Q. No legacy to you? A. No, sir.

"Q. Not to *any one* else? A. Not that I
"remember.

"(V. 501. Vaughan.) Q. Was there not a
"provision in that codicil for Miss Anner
"Amelia Joyce? Not that I remember.

"Q. Was there not a provision in that codi-
"cil for Mrs. Fayerweather? A. Not that I
"remember.

"Was there not a provision in that codicil
"for Mrs. Achter? A. Not that I remember.

"Q. Or for Mrs. Emma S. Drury or Fayer-
"weather? A. Not that I remember.

"(A. VI. 673 Vaughan.)

The List of Names and Figures Vaughan made, when the Fourth Codicil was Planned.

"Q. You have a son, haven't you, Mr.
"Vaughan? A. Yes.

"And did you send him for any paper to
"Mr. Fayerweather within a short time be-
"fore his death? A. If I did, I have for-
"gotten it.

"Did you leave a memorandum there by
"mistake which you sent for? A. If I did, I
"have forgotten it.

(II, 551. *Mrs. A. A. Joyce Reynolds*).

"56 Q. Was any draft or memorandum as
"to the contents, which should be in the new
"codicil, prepared, so far as you know? A.
"Yes.

"57 Q. State what the fact is, in that re-
"spect, please? A. They proceeded to make
"this draft, what Mr. Fayerweather wanted
"to do. It was drawn then and left at Mr.
"Fayerweather's house through mistake.
"58 Q. What became of it, do you know? A.
"Mr. Vaughan, going away hurriedly, left the
"will and this draft with the will in an en-

"velope, in the table-drawer of the sitting "room. The next morning he sent his son to "Mr. Fayerweather's house with a note, ask- "ing me to deliver him that memorandum. I "asked Mr. Fayerweather about it, and he "said: "I do not know; but if you will open "that table-drawer you will find an envelope "with my will. You open that, and examine "the contents, and examine that, and perhaps "you will find it. I did. He asked me to read "a portion of it to him for his identification. "Or he said: 'Read it, and I will tell you if "it is correct.' I read a portion of it. He "said: '*That is correct.* You put that in an "envelope and seal it, and gave it to Mr. "Vaughan's son.'

"Do you recall what it was you read? A. "I would rather not state, Mr. Sherman. If "that is important I could tell you, though?

"60 Q. I think we had better take what you "remember about it. Do you remember whose "handwriting it was in? A. It was in Mr. "Vaughan's handwriting.

"61. Q. How many pages of it were there? "Was it a single page, or more? A. It was "on very long legal paper.

"62 Q. (Handing paper.) That is what we "call legal cap. A. It was on a longer paper "than that, unless it was joined together; and "it was names and figures.

"63 Q. Do you remember any of the names? "A. Mrs. Fayerweather's name appeared first.

"64 Q. Well, any others? A. My name.

"65 Q. Any others? A. Three nieces.

"66 Q. Any others? A. Yes; but I cannot "recall the names, as they were. I know I "read *those* names.

"67 Q. Are there any other names that you "can recall,—without taking them necessarily "in the order in which they were there?

(P. 553.) "A. I heard several names called by "Mr. Fayerweather to Mr. Vaughan, when he "was making out this list, as to who he wished "to give to.

68 Q. What names were those? A. One "name was the wife of my brother, Mrs. Har- "riet Joyce. Another name that he asked was "the Rev. William Lloyd."

What Dr. Vedder, the Family Physician who witnesses the Execution of the Fourth, or "Burned" Codicil, says.

"*By the Surrogate:*

"Q. The time Mr. Fayerweather signed this "paper that you witnessed, what was his con- "dition of mind as you observed it? A. I "think he was competent.

"Q. Had you any doubt about it? A. No, "sir.

"Q. Was the paper read to him in your "presence and hearing? A. Yes, sir.

"Q. Who read it? A. The lawyer.

"Q. Mr. Butler? A. I think that was his "name.

"Q. Did Mr. Fayerweather say anything "after he had read it or whilst he was reading "it? A. Yes, sir; that I referred to in my "testimony the other day.

"Q. What did he say? A. He asked *me* "(should be "him") to read a portion

" of it. Then, after reading, he said: '*As I* " *understand*', *it is—if* you want me to " repeat it.

(V, p. 698). " Q. Yes. A. '*After everybody* " *and everything is satisfied, the remainder* is " to be divided up among the *different institu-* " *tions*, each to receive their *share*.'

" Q. To whom did he say that? A. Most of " it was directed, the conversation, towards me, " and then towards the lawyer. He first looked " at one, and then at the other. He looked " directly at me, when he made this statement.

" Q. Was he in bed? A. No, sir.

" Q. In his chair? A. At the side of the " table.

" Q. In the sitting room? A. Yes, sir, and " he signed his name sitting at the library " table."

(Dr. Vedder did not state who Mr. Fayerweather meant by "*everybody*".)

(VI, 368–79) Dr. Vedder testified thus:

" While he was reading, Mr. Fayerweather " interrupted the lawyer, and said to him 're- " ' read that', or words to that effect; and the " lawyer kept on reading. I did not under- " stand what it was. Finally Mr. Fayer- " said to the lawyer, '*As I understand it*, after " ' everything is paid *and everybody is satis-* " ' *fied*, the *balance*, or *what is left*, goes to " ' the *different institutions*, and each to re- " ' ceive their *share*.' He directed his conver- " sation mostly towards myself, and then to " the lawyer."

Dr. Wilcox, another witness of the execution of this *fourth* codicil, testified as follows:

Q. "Did you hear any conversation with Mr. "Fayerweather and the lawyer? A. I did.

"Q. Will you state what that was? A. The "conversation, the lawyer was reading this "paper, and Mr. Fayerweather interrupted "him. The lawyer made a reply, which I did "not hear distinctly, and then Mr. Fayer-"weather said, 'As I understand it, *everything* "*is to be paid up, settled;* the institutions to "be paid *their money;* and *what is left* is to be "*divided*'."

(Dr. Wilcox did not state among whom the "what is left" was to be "*divided*".)

Wednesday—November 12th, 1890.

Three "PRESENTS."

Upon this day Mr. Fayerweather made Vaughan a "present" of.....	$25,000.
This was paid in securities taken from his box of securities (Vol. II, Pages 72, 5.	
He gave to Franklin B. Myrick, his confidential clerk.....	$25,000.
He gave to his niece's husband, Ex-Probate Judge Beardsley, of Bridgeport, Conn., for himself.....	$50,000.
He also gave him, in trust, for his three children (II, P. 100).....	$75,155.
Total "presents" to-day.....	$175,155.

Franklin B. Myrick, the testator's confidential clerk, at first declined to tell. When Judge Lacombe ordered him to, he said that these amounts were given "as presents" (II. 100).

(II. 894.) Did not Mr. Fayerweather then (November 12th, 1890) tell you that he had given, or was about to give $25,000 to Henry B. Vaughan, to look after and protect the interests of his wife, after his death?

Same objection by Mr. Arnoux (immaterial, irrelevant, and incompetent), who was *not* Vaughan's counsel; objection sustained.

(Myrick declined to testify that he had received this $25,000 until Judge Lacombe ordered him to do so. The only other explanation is as follows.) (II. 16.)

> "(II. 561.) Mrs. A. A. Joyce Reynolds testi-
> "fied thus, to an interview with the testator
> "on the day of his death, before the codicil
> "was executed—but after Vaughan had left
> "the house.
>
> "He said 'Don't deceive yourself—You can
> "not deceive me. I shall die to-day. I heard
> "what the Doctor said.' He then told me
> "what he wanted me to do. And he said, at
> "all times, he wanted me to call upon Mr.
> "Vaughan, Morris Beardsley, and Mr. Myrick
> "for *any thing* I might want to know. That
> "Mr. Myrick knew all about his affairs, and
> "the others would give me all the information
> "I desired, *because he had paid them for doing*
> "*it.* I was not to offer them any money. He

" said he had given Mr. Vaughan $25,000, Mr. " Myrick $25,000 and Mr. Beardsley $50,000, and " *that I was to go to them for any thing I* " *wanted*. He said 'I *think* Mr. Vaughan is " my friend. I *know* Mr. Bulkley to be an " honest man'.

" Then there were a few other things he said " to me about what he wanted me to do. He " asked me to go and take a little rest; and " ask his wife to come to him. He wanted to " talk with her. But after she came into the " room, he was not able to carry on any con- " versation at all."

THURSDAY, November 13th, 1890.

Two letters from Mr. Fayerweather to Ritch.

And as to the Truth of the Second One.

(VI. 650, Vaughan.) " Q. Now we have got " to a point, Mr. Vaughan, those were copies, " were they not? (referring to the will and " codicils that Mr. Fayerweather had) A. Yes—

" Q. Did you go for the *originals?* A. Yes—

" Q. At whose request? A. At a written " request signed by Mr. Fayerweather."

(The only written authority for these "presents"—written *by Vaughan*—all but its signature—if it *was* signed, will be referred to hereafter, under Saturday, November 15th, 1890.)

It reads as follows. (See page *ante*—)

" Q. I think that is the letter? A. Yes.

"Q. (This letter was written by Miss A. A. "Joyce) (H.). Vaughan himself at the "same time wrote what was known as the "*second* letter."

(VI. 827—) Asked as to statement in Second letter of Nov. 13 from Mr. Fayerweather to Ritch that Mr. Fayerweather *had* examined his original will and codicils.

"It was NOT TRUE as an actual matter of fact?

"A. It was not true as an actual fact—,

"That he had examined them at the time.

"Q. And you caused it to be prepared in that "way? A. I wrote the letter. *It is my hand-* "*writing.* I was seeking for information, and "that was the shortest way to get it, and it "would not necessitate another visit to Mr. "Fayerweather. Simply a question of conveni- "ence, and in order to save my going to 57th "street twice.

(VI. 828.) "Q. Did you read this over to "Mr. Fayerweather this letter? A. I AM *not* "SURE THAT I READ IT OVER TO HIM.

"Q. He knew what it was, when he signed "it—didn't he? A. Well, I *presume* he did. "He signed it, BUT I AM NOT SURE THAT I "READ IT OVER TO HIM.

"Q. Do you think you allowed Mr. F. "to sign a paper which contained—, I will "call it AN ERRONEOUS statement, as it cer- "tainly was—, WITHOUT calling his attention "to the fact? A. I THINK I DID, IN THAT "INSTANCE. I think I tried to impress "upon you that it was I that was espe- "cially desirous for the information.

"Q. Yes, but you don't mean to imply that

"YOU ONLY engineered these codicils? A. I "THINK I WAS VERY LARGELY THE CAUSE OF "THE WHOLE THING. He signed his name.

"Q. Did he *know what he was about*, from "what you told him? A. I *presume* he did; I "haven't the least doubt that he did.

"Q. At what hour Friday, Mr. Vaughan, did "you give this second letter to Mr. Ritch? A. "Some time in the afternoon.

"Q. WAS IT TRUE—the statement contained "in the second letter, that the will—the *origi-*"*nal* will—and the first, second and third "codicils, HAD BEEN examined BY MR. FAYER-"WEATHER, true at the time you delivered the "second letter to Mr. F.? A. No, IT WAS "*not* TRUE. You know I stated that I did *not* "see Mr. F. ON FRIDAY at all.

"(630) Q. It was not correct when you wrote "it, and it was not correct when you handed "it to Mr. Ritch? A. No, sir, it WAS NOT.

"Q. Did you *tell* Mr. Ritch that IT WAS NOT "CORRECT? A. No, sir, I DID NOT.

"Q. You let him understand THAT IT WAS? "A. YES.

"Q. Did you? A. YES.

Vaughan's Interviews with Ritch.

How They Affected Ritch.

Vaughan went to Ritch's office this Thursday, Nov. 14th, and handed the first letter to Ritch, who said to him (VI. 660 Vaughan):

"That he would send them (referring to the

"original will and codicils). What took place "at this interview is thus described by "Vaughan, in a letter he wrote upon that day "to Miss Anner Amelia Joyce (now Mrs. J. B. "Reynolds).

(IV, 222)

NEW YORK, Nov. 13th, 1890.

"DEAR MISS JOYCE:—Will you please ex- "plain to Mr. Fayerweather that I have ob- "tained the papers from Mr. Ritch. At first "Mr. Ritch stated that he would take the "papers to Mr. F., but I reminded him that "the letter read to *give* them *to me*, and he "said he would do it. *He grew as white how-* "*ever as the paper upon which I am writing.* "I will deliver the *second* letter to-morrow. "*There is, however, but little use of this*, as "*I am convinced from his manner, that Mr.* "*Ritch knew exactly what he was doing.*

"Truly yours,

"HALL & VAUGHAN.

"I will see him Saturday morning."

(He inadvertently signed his firm's name.)

"He delivered the *second* letter; not upon "this day, but upon the next day, Friday, as "agreed."

Friday, November 14th, 1890.

During these two days he had several consultations both with Ritch and Butler (Vol. 711-12).

Friday, Nov. 14, 1890.

After delivering said second letter to Ritch,

the latter had an answer to it, type-written, and read and delivered it to Vaughan, to be carried by him to Mr. Fayerweather, to whom it was addressed (V, 298.)

Ritch also, upon this Friday, wrote the following letter to Miss A. A. Joyce (IV, 224):

"My dear Miss Joyce:—I have had two "*long* talks with Mr. Vaughan to-day and yes- "terday, and I fear Mr. Fayerweather *is worry- "ing over* his business matters. *Mr. Vaughan "says that Mr. F. is to ill to be seen;* and so I "would be glad to have you say to him, if you "think it well, that *I will execute any paper*, or "*say anything* in your presence, or in that of "anyone else, that will enable him to feel that "his wishes will be carried out to the letter. "It will be a misfortune indeed to me to lose his "confidence *after so many years*, through any "misunderstanding now. *The will and codicils* "provide carefully for the *institutions* in which "he was interested, and for the relatives and "friends to which he was attached; and I know "that, at the time the papers were drawn, the "reasons for each paragraph were considered "and approved by him; the object being to "prevent any contests.

"I write thus freely to you, because you "have known Mr. Fayerweather's affairs, and "I believe that you, as well as he, believe "that I have only tried to do my duty. If, "at any time, you or Mr. F. would like to see "me, I will call.

"Sincerely yours,
"Thomas G. Ritch."

She Read Both Letters to the Testator.

(II, 884). Reynolds thus testified, as follows:

"Q. I show you Exhibit O, which purports "to be a letter signed by Thomas G. Ritch, and "addressed 'My dear Miss Joyce,' dated Nov. "13th, 1890. Did you ever see that paper be- "fore, Mrs. Reynolds? A. Yes, sir.

"Q. When did you first see it? A. On the "14th of November, about 8 o'clock in the "evening.

"Q. 1890? A. 1890.

"Q. What did you do with it? A. I *read it* "*to* Mr. Fayerweather.

"Q. Mr. Daniel B. Fayerweather? A. I did.

"Q. I now show you a letter, dated New "York, November 13th, 1890, purporting to be "signed Hall and Vaughan. When did you "first see *that* letter, if you have ever seen it be- "fore? A. That letter came by the *same* mail.

"Q. About eight o'clock in the evening of "November 14? A. Eight o'clock in the even- "ing of November 14, 1890.

"Q. What did you do with this letter? A. "I first read it to myself. And *then read it* "*to Mr. Fayerweather*.

"P. 885.

"Q. Do you know in whose handwriting it "is? A. It is in Mr. Vaughan's.

"Q. How soon after you received them, did "you read these letters to Mr. Fayerweather? "A. As soon as I read them myself, I told him "that I had received those letters and I read "them.

"Q. I asked when; immediately after the

"receipt of them? A. *Immediately* after the "receipt of them."

(II, 902.) She says that Mr. F. asked her on the evening she got said letter from Ritch, to give it Vaughan when he came, "and I did it" (on his arrival on Saturday morning).

The Testator Refuses to see Ritch.

II. 558. She said. A. "I read some letters to "him on Friday evening, about 8 o'clock. "He understood them, and made some remark "about them, and one was from Mr. Vaughan.

"108 Q. What did he say in reference to the "letter from Mr. Ritch? A. He remarked, "'Poor Ritch. He has gotten into trouble, "*but I will not see him.*

"109 Q. What had Mr. Fayerweather said "prior to that time, if anything, in reference "to his attitude or opinion of Mr. Ritch? A. "He had said, from the time of reading that "will, to me *repeatedly*, 'If *that* man comes "here, *don't let him up stairs. The sight "of him would kill me.*' And I would quiet "him saying, 'You shall not see him.'

The Testator's Condition Upon the Evening Before He Died.

"His professional nurse and masseuse,— "Mrs. Elizabeth L. Goodwin,—who had been "attending him daily,—testified thus, as to "his condition upon this Friday,--the night "before he died."

(II. 432) A. I went in as I always did, and "I said, 'Good evening Mr. Fayerweather,'

" and he didn't pay any attention to me, and " he was a little hard of hearing. So I step- " ped up towards his head, and put my hand " on his forehead, and I said, ' Good evening, " Mr. Fayerweather; do you know I am " here?' And he said, ' Uh ' (nodding). " So I spoke the second time, I said, ' Good " evening, Mr. Fayerweather,' and put my " hand on his forehead like, I thought maybe " he was dozing, and I said, ' I am here,' and " he said ' Uh.' And it was so unlike him, a " kind of a shock went through me; and I kind " of put my hand on his forehead, and he never " said anything, and it was so unlike he had " ever done before; and then I stepped back " to the foot of the bed like; there was my " little chair there that I always used, and I " put my hand under the cover on his limbs, " from the knees down, and on his feet, and " they felt very cold; and there was a kind of " a shock went over me, and I said, ' My, Mr. " Fayerweather is dying.' And I waited a " few moments, and I didn't say anything " more; and I got nervous myself; and at that " I put the cover over him and slipped out " into the room——

" Q. Into the front room? A. Into the " front room, into the sitting room, and I " said to the ladies. " I do not think I " will disturb Mr. Fayerweather to-night, he " seems so—I don't know—as if he had had a " shock or something; he seems so quiet and " drowsy, and don't seem to speak, and I don't " think I will disturb him, and I will come in " to-morrow night," I said, " to see him," and " Mrs. Fayerweather said, " Well, why, Mrs.

"Goodwin?" and I said, "Because I do not "think it is best to disturb him," and I felt "then that Mr. Fayerweather had a shock of "death, but I did not say it, but I said, "I "will come around to-morrow evening," and "at that I went out, I did not tell them what "I thought.

"*Mr. Bishop.*—I move to strike out the "answer of the witness upon the ground—

"*The Witness*—I did not quite finish that.

"*Mr. Bishop*—Didn't you? Then I will "wait.

"*The Witness*—I said to Mrs. Fayerweather, "Mr. Fayerweather has had a very bad shock "of some kind, do you know; and she said, "No, I don't"; I didn't know whether it was "paralysis or what.

"Asked as to his capacity for understanding "a document of any length, if read over to "him that day or the next day, she said "(II. "434)." I do not think he was competent. "Not when I saw him last.

Saturday, Nov. 15, 1890, the Day of Mr. Fayerweather's Death.

"(II, 110 Q.) Mrs. A. A. Joyce-Reynolds "testified thus: Did Mr. Vaughan say any "thing on Saturday, in your hearing in "reference to the execution of *a paper* on that "day, by Mr. Fayerweather, and, if so, what "did he say? * * * A. Mr. Vaughan was "at the house on Saturday morning. Mr. "Fayerweather had told me he would be there "by appointment. I said to him; "I shall "not let you see any one to-day."

Vaughan's Morning Talk with the Testator upon the Day of His Death.

"(I, 584) Mrs. A. A. Joyce-Reynolds testi-
"fied thus: He says, if Mr. Vaughan comes
"here I must see him." That was very early
"in the morning, before daylight. "I want
"you to give him that letter of Mr. Ritch. He
"had remembered reading it the night before.
"Mr. Vaughan came into the house, as I was
"going out of the door, for the doctor. As
"he had not come at ten o'clock, I became
"alarmed, and was going for him, in order to
"have a consultation that day.

"112. Q. That is, you were going for the
"doctor? A. For Dr. Vedder, to have him
"appoint a consultation with Dr. Janeway.

"And Mr. Vaughan came in as I was going
"out of the door. * * * And I returned
"with him to Mr. Fayerweather's room, and
"I left Mr. Vaughan there. I went to the Doc-
"tor's, and told him my fears about Mr. Fayer-
"weather and when I returned Mr. Vaughan
"left the room. Dr. Vedder came back with
"me.

"113. Q. Let me ask you just here, about
"what interval of time elapsed, between your
"leaving Mr. Vaughan with Mr. Fayer-
"weather, and your return with the Doctor,
"and finding Mr. Vaughan there? A. I left
"the house at ten o'clock. It could not have
"been more than half an hour I waited for
"the doctor.

"114 Q. At his house? A. At his house.

"115 Q. And then came back with him? A.
"I went for him with a coupé; and then I
"came back with him.

Dr. Vedder Notifies Vaughan in the morning that Mr. Fayerweather is Dying.

"116 Q. Now, what did Mr. Vaughan say "then? A. And Mr. Vaughan left the room. "And the Doctor examined Mr. Fayerweather. " * * * As he started to leave the room, "he gave me a look, that he wanted to speak "with me.

"117 Q. Who gave you a look? A. Dr. "Vedder. And I followed him, and he says, "*Mr. Fayerweather will not survive the day.* "If he lives *until* night,—I shall be *sur-* "*prised.*

"118 Q. Was Mr. Vaughan there at the "time? A. I said to the Doctor, 'Tell Mr. "Vaughan!' * * * He went into the front "room, and Mr. Vaughan was standing by the "window in the room. *And he told him.* "And Mr. Vaughan became very much ex- "cited, and said: 'There is *a paper*, that "has to be signed to-day.' And the doctor "said, '*It is very cruel.*'

"He spoke of it being *an outrage*, to ask a "man, *in his condition*, to sign *any* papers; "and he said, "It must be a *very* important "paper, to ask a *dying* man to sign it.'

"Mr. Vaughan says: '*It's very impor-* "*tant.*'

"And then he asked the Doctor if they—he "said: 'Who can you have as a witness?'

"The Doctor says, 'Does it require a wit- "ness?'

"He said, 'Yes; it requires two witnesses, "or three.'

"I asked Dr. Vedder if he and Dr. Wilcox "could act as witnesses; if it was important, "that it should be done. The Doctor told him, "if it was to be done, it should be done *as* "*quickly as possible.* Mr. Vaughan hur- "riedly put on his overcoat, and went back "into the room, and said to Mr. Fayerweather, "'There is *a paper* to be signed, and Mr. Fayer- "weather lay in this condition, and he opened "his eyes wide, and says 'Can't it be done "*Monday*'? Dr. Vedder said then, 'Mr. "Fayerweather; if there is any papers to be "signed, they *must be* done *to-day*'.

"And there was a perfect ashy paleness "came over Mr. Fayerweather's face. *He* "then knew, for the *first* time, he was to die "*that day.* * * * Mr. Vaughan left the "house in less than five minutes—as quickly "as he could put on his overcoat.

Asks the Doctors to Witness Fifth or Death-Bed Codicil.

"* * * Before going, * * * I made the "appointment with Dr. Vedder and Dr. Wil- "cox—to witness this paper.

"Dr. Vedder appointed the time as being the "most convenient for him.

"Previously he had told me he did not think "that Mr. Fayerweather would live *till* night. "But he appointed 4 o'clock to sign this paper. "Mr. Vaughan left the house and returned be- "tween 1 and 2.

Vaughan Notified the Doctors Not to Come to be Witnesses.

"(II, 575.) *A. A. Joyce Reynolds*, 205 Q. "What, if anything was done, when Mr. "Browning and Mr. Grout came, in reference "to the engagement previously made with Dr. "Vedder, to witness the paper? A. Well, "before I knew of it at all,—in fact, I never "thought of it again, until after Mr. Fayer- "weather's death,—but *Mr. Vaughan sent* our "colored butler *to Dr. Vedder to say his ser- "vices would not be required. I knew nothing "of it.*

"(II, 647-8) *John C. Baylor*, the butler, tes- "tified thus:

"Between two and three o'clock (P. M. Nov. "15th, 1890) *he* (Vaughan) *told me to tell* Dr. "Vedder and Dr. Wilcox that their services "would *not* be needed that afternoon. * * * "'I went up and delivered the message to Dr. "Vedder.'

"(VI, 714.) Vaughan testified as to this in- "terview thus."

"Q. Did you use the word 'cruel', or any "such word? A. Nothing like it.

"Q. Did he say anything which conveyed to "your mind the impression that there was any "cruelty, or impropriety of any kind, in hav- "ing Mr. Fayerweather execute this paper at "any time of that day? A. nothing of the "kind."

How the Doctor Tried to Prevent the Execution of an Important Codicil by a Dying Man.

(VI, p. 389.) Dr. VEDDER testified thus:

"Q. You said in answer to a question of Mr. "Parsons, that Mr. Vaughan had said that he "would have a paper executed on Monday. At "what time was it, the fifteenth? A. Satur- "day.

"Q. Did he tell you *what* paper it *was?* A. "*No, sir.*"

The Doctor Did Not Know That It Was a Codicil.

"Q. He did not tell you whether it was a "will or a codicil—or *what* it was? A. He "did *not.*

"(VI, 396.) Q. And nothing that Mr. "Vaughan told you, led you to believe that it "was a *codicil*, or a will? A. *No, sir.*

"* * * *I thought* that the *codicils* and "the will *were all finished.*

"* * * I thought it had something to do "with *the concern*, with the house" (of Fayer- "weather & Ladew). *I didn't think it was a* "*codicil or a will.*

"Q. And nothing that Mr. Vaughan *told* "*you*, led you to believe that it was a codicil "or a will? A. *No, sir.*

"Q. And when you said it must be executed "at once, you were under this impression? A. "*I was.*

"(VI, 398.) Q. Who fixed four o'clock? A. "Miss Joyce or Mr. Vaughan. I am not posi- "tive.

"Q. * * * Was any reason assigned by "either of them for putting it off so long? A. "No, sir.

"Q. And you accepted what they said about "that; you didn't say anything further on "the subject? A. I merely said *yes;* * * * "*I didn't say I would be there at four o'clock.* "*I merely* said *yes*.

"(VI. 398. Dr. Vedder.) Q. But that was "what you *meant*, wasn't it? A. It might "not have been *necessary* for me to be there. "* * * I didn't know whether that they "would send word that I need *not* come.

"* * * 464. *I was in hopes* he would "*not* bring the paper at all, because *I did not* "*want Mr. Fayerweather to sign the paper*;

"463. *I didn't think he was competent to* "execute it *then*. * * *

"Q. 465. (By Mr. Parsons:) If the execution "of such a paper could be injurious to Mr. "Fayerweather, wasn't it your most impera- "tive duty to prevent this injury to him? A. "I *did* say to him, *it was cruel* to ask him to "sign an important paper; or to sign his "name.

"466. * * * A. Then I saw he was going "to do it; *and I tried to prevent him, in that* "*way*.

The Alleged Fifth, or Last Codicil.

"When Vaughan reached Ritch's office "Ritch was in a hurry to get away (VI. 809), "and turned him over to his partner, General "Woodford, who drew a paper reading thus "(IV. 196–197):

"I, DANIEL B. FAYERWEATHER, of the City "of New York, having made and executed my "last Will and Testament dated October "Sixth, 1884, and Codicils thereto dated De- "cember Thirteenth, 1884, January Seventh, "1888, and March Nineteenth, 1889, do hereby "make, publish and declare this fourth Codi- "cil to and as a part of my last said Will.

"*First.*—In all respects, except as hereinaf- "ter modified I ratify and confirm my said "Will and the Codicil thereto.

"*Second.*—I hereby confirm the revocation of "the Tenth paragraph of my said Will.

"*Third.*—I hereby amend and change the "third paragraph of the Codicil dated and made "December Thirteenth, 1884, so as to read as "follows:

"ALL the rest and residue of my estate, of "whatsoever character, and wheresoever situ- "ated the same may be of which I die pos- "sessed and remaining after all the specific "legacies in my said Will and the several co- "dicils thereto have been paid, and all the "provisions of said Will and codicils have "been fully complied with and carried "into effect, I give, devise and bequeath to "Justus L. Bukley, Thomas G. Ritch and "Henry B. Vaughan to them and their heirs "forever.

"IN WITNESS WHEREOF, I have hereunto "subscribed my name and affixed my seal this

"fifteenth day of November, one thousand "eight hundred and ninety.

D. B. FAYERWEATHER. [SEAL].

"Subscribed, sealed, published and declared by the above named Testator as and for a codicil to his last Will and Testament, in the presence of us, who, at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses, the day and year last above written.

"ELIZABETH R. JOYCE, residing at 353 "Whalley avenue, New Haven, Ct.

"J. PRENTISS BROWNING, residing at 80 "Clinton place, New York City.

"EDWD. MARSHALL GROUT, residing at 860 "Carroll street, Brooklyn.

Vaughan Substituted Other Witnesses, Clerks from Ritch's Office, in Place of the Physicians.

Woodford testified thus—

"A. Mr. Vaughan asked me if there was any one who could go up to witness the codicil for they might not be able to find witnesses at the house. I think that was about what he said." (VI. 230)

(II. 560.) Mrs. A. A. Joyce Reynolds testified thus—

"119 Q. Did Mr. Vaughan then leave the

house? A. Mr. Vaughan left the house, in less than five minutes. As quickly as he could put on his overcoat.

"120 Q. Did he return again that day? A. Yes.

"121 Q. About how long after leaving? A. Before going, Dr. Vedder—I made the appointment with Dr. Vedder and Dr. Wilcox that they should be there about 4 o'clock to witness this paper. *Dr. Vedder appointed the time* as the most convenient *for him.*"

(VI, 723.) Vaughan testified thus:

"A. When Dr. Vedder suggested that if I "had any papers for Mr. Fayerweather to "sign I should have them signed soon—Miss "Joyce was in the room, as I remember. And "*I turned to her, and asked her to arrange to* "*have the doctors there*, as they were there "before. Miss Lizzie Joyce was in the house; "and I thought I would be able to get through, "and back again, before four o'clock; and we "fixed *that* time.

"(P. 724.) Q. For what? A. For the sign- "ing.

"Q. When you say "we", whom do you "mean? A. Miss Joyce and I, and Dr. Ved- "der, we were all three together.

The Witnesses—Young Clerks from Ritch's Office.

(VI,501.) Edward M. Grout, a young clerk from Ritch's office, testified thus:

"Mr. Vaughan had previously given me, in the "front room, the original will, and the other "codicils.

"(P. 509.) Q. Did you have any conversa-
"tion, before you started to Mr. Fayerweather's
"house, or respecting any testamentary papers
"of Mr. Fayerweather, with any other person
"connected with office, than General Wood-
"ford, and Mr. Browning? A. I think not.
"I may have left word at the office where I
"was going.

"(P. 511.) Q. After that you say you first
"read this paper? (Meaning the proposed
"codicil of Nov. 15th, 1890.) A. On the train
"on my way up.

"P. 519—Q. Had you heard that day that
"there was in existence a codicil to that paper,
"which undertook to give the residuary
"estate to Mr. Buckley and Mr. Ritch indi-
"vidually? A. I knew there were codicils in
"which—I had them in my hand. But I
"didn't know the contents of them.

"Q. Who gave you the codicils that day?
"A. Mr. Vaughan gave me the fourth original
"instrument (meaning this same proposed one
"of Nov. 15).

"P. 520—Q. Mr. Vaughan? A. Yes. He
"gave me the codicils.

"523—Q. Did you invoke the aid of Mr.
"Vaughan—or had you invoked the aid of
"Mr. Vaughan to get possession of these
"other papers before you began to read? A.
"I asked him if he had the original will. * * *

"Q. And what did he say? A. He said yes.

"Q. He said that on the train? A. Yes.

"Q. And did he show them to you on the
"train? A. I think he handed them to me in
"the front room, upstairs. (523.)

"Pp. 523-524.)—I think I first seen them

" when they were handed to me by Mr. Vaughan " in the front room, after or at the time, when " I had been told that Mr. Vaughan—that " everything was ready. * *

" Q. Did you look them over before you " went into the room? A. I did not.

" Q. And at what stage did you open them, " or any of them? A. When I came to the " point of the codicil which refers to the tenth " clause of the will, I opened the will and " turned over the leaves to the *tenth* clause.

" Q. Did you open any *other* of the papers? " A. I did *not*.

" Q. Did you read or explain any portion of " the will, *except* the tenth article? A. I did " *not. I never knew anything of the will* or the " rest of the codicils, *except* the *tenth* clause, " until after they were brought, or until just " before they were brought, for *probate* down " here; and after Mr. Fayerweather's death.

" 528. I turned to *Mr. Vaughan* and I said, " 'Is there any need of any particular care in " the execution of this paper' and *he* said, *No*, " *I think not.*'

" 532 Q. Didn't *you* think it important to " call Mr. Fayerweather's attention, not simply " to the residuary clause, but to *all* the various " provisions of these various papers? A. I " did not. I only thought it necessary to call " his attention to the provision, which, by the " codicil, *was altered; assuming* that the " man *would know* the rest himself.

" P. 533. You did not know, Mr. Grout, " that, except for his saying 'Yes—Yes, I " know,' when you were there reading, or " calling his attention to the *tenth* article of

" the will, you did not know that Mr. Fayer-
" weather had ever seen the inside of any one
" of those papers, did you? A. I think I did.
" Yes, sir.

" * * * Q. Now, I want to know how it is, if
" you thought there was need for special care
" in this case, that you were contented merely
" with the reading of this codicil itself, with-
" out reading the will and the codicil which it
" undertook to ratify and confirm. * * * A.
" That I thought it was necessary to read that
" part of the will altered by the codicil; and
" not the part ratified and confirmed.

" Q. What part of the will was altered by
" the codicil? A. The tenth clause. * * *

" P. 534. Q. Did you understand what modi-
" fication any previous codicil had made in the
" tenth article of the will? A. I did *not*—I
" have told you I did *not* know what the codi-
" cils contained.

" Q. Now, read, Sir, from the fourth codicil,
" what you say was the modification of this
" will, of the tenth article of this will; any-
" thing that modifies the tenth article of this
" will. A. 'TWO—I hereby confirm the revo-
" cation of the tenth paragraph of my said
" will.

" Third—I hereby amend and change the
" third paragraph of the codicil, dated and
" made Dec. 13, 1884, so as to read as follows'—
" and then follows the residuary clause".

" P. 535. Q. Now, why didn't you read the
" *third* paragraph of the codicil, dated and
" made Dec. 13, 1884? A. I did not regard it
" as necessary. It is contained in here with
" the alteration.

"Q. In where? A. In here, with the altera-
"tion, "I hereby amend, and change the third
"paragraph of the codicil, dated and made
"Dec. 13, 1884, so as to read as follows". And
"then follows the paragraph with the altera-
"tions.

"Q. But how did you know that the testator
"knew what the *third* paragraph of the codi-
"cil, dated and made December 13, 1884, was,
"before it was changed? A. Just in the same
"way as I know what any man understands of
"my conversation when I am talking to him.

"Q. That is what you call *special* care, is
"it? A. I do. I read the paragraph which
"was revoked by the codicil, and then read
"the amended paragraph.

"* * * Q. Mr. Grout, did you not know
"that the change that was expected in the
"third paragraph of the codicil, brought in Mr.
"Vaughan to certain privileges, which he could
"*not* have enjoyed, if the previous papers had
"gone to probate *without* that codicil? A.
"I knew *nothing* of the effect of the third
"codicil. * * *

"Q. But I am talking about the fourth cod-
"icil? A. I did *not* know that he was referred
"to, Mr. Vaughan or anyone else. I knew it
"was amended 'so as to read as follows'. I
"did not know what its *prior* form was.

"* * * Q. Now tell why you thought it
"important to read the tenth article of the
"will, which simply confirmed a revocation,
"and did not read the third paragraph of the
"codicil, wherein that revocation was con-
"tained? A. Because I thought that Mr.
"Fayerweather should have his special atten-

" tion called to what was revoked. And, " as to what stood in the third paragraph, " It was contained here, with the alterations; " and that there was a complete paragraph, as " amended. I may have been wrong, and you " may go on and criticise me, if you choose, " but there is the fact.

" P. 536–7, Q. Don't you see Mr. Grout, that " you *were* wrong? A. I think I was perfectly " right.

" Q. Don't you see that that paragraph in the " will, which you read to him, or which you " undertook to explain to him, had already " been killed dead? A. Certainly.

" * * * Q. And that the sensible and " proper thing for you to have done, if you " really *had* been taking *special* care, was to " show Mr. Fayerweather how his will would " stand *without* the modification of the fourth " codicil and how the modification of the fourth " codicil affected it? A. No, I don't.

" * * * Q. There was nothing *said*, was " there, by Mr. Fayerweather, in your presence " or hearing to indicate at all that he knew " what change was affected in the third para- " graph of the codicil of December 13, 1884, " by the fourth codicil? A. Oh, yes, sir. He " declared that to be a codicil to his will * * * " He rose to sign it. He arose. * * * He " declared and published it as a codicil to his " will. Nothing more. No, sir. * * *

" Q. Was there anything that showed you " that he had the faintest idea what was the " *contents* of the *third* paragraph of the codi- " cil of December 13, 1884, except what you " have just said, when he executed this other

"paper? A. *He did not say anything*. But "I could see that he he knew well enough what "he was doing.

"Q. I presume that you are able to give us a "pretty good imitation of the way a man looks "when he knows that he has given his residu- "ary estate to Justus L. Bulkley and Thomas "G. Ritch? A. I should think, if you will "allow me, it is not merely by the look that is "on his face—not merely how a man looks, "that you ascertain whether he knows what he "is doing, but by his general manner and con- "duct.

"Did he say that he was giving his residuary "estate to Justus L. Bulkley and Thomas G. "Ritch? A. I don't know that he used those "*words*.

"Q. Did he say that he knew? A. He did "*not* use those words which you have used.

"Q. But he *looked* it? A. He looked it, "*he looked intelligently*.

(P. 533). "Q. How? A. From the fact that "paper which I was reading, recited certain "instruments. And that Mr. Fayerweather, "*by his silence*, assented to them. He *must* "*have* known."

Testimony as to whether the testator spoke at all in the five minutes, when the last codicil was being executed.

(VI, 533, SURR. CT.): GROUT.—

"When asked if he did not know if Mr. Fay- "erweather had ever seen the inside of any of

"the papers the last codicil referred to, and "he said that he did; he was asked then as "follows·

"Q. *How?* A. From the fact that that "paper which I was reading, recited cer- "tain instruments, and that Mr. Fayerweather "*by his silence* assented to them, he must "have known.

(537.) "Q. Was there anything that showed "you that he had the *faintest idea*, what was "the contents of the third paragraph of the "codicil of Dec. 13, 1884, except what you "have just said when he executed this other "paper? A. HE DID *not say anything*. But "I could see that he knew well enough what "he was doing.

"* * * He looked intelligently.

(501.) "When I reached the point where the "codicil refers to the tenth clause, I think that "is the number in the original will—I discon- "tinued reading the codicil; and opened the "will at that clause, and there read that clause "through, or read *the substance of* it to Mr. "Fayerweather; again Mr. Fayerweather in- "terrupted me BY SAYING 'YES, YES I KNOW'.

"* * * Q. Will you please repeat *what* "it was that Mr. Fayerweather *said* who you "reached the tenth paragraph of the will. "Give the substance of it. A. TO THE BEST "OF MY RECOLLECTION, Mr. Fayerweather in- "terrupting my reading, *said;* the words "'YES. YES, I KNOW, OR SOMETHING TO "THAT EFFECT.

502 "Q. Now, go on? Mr. Fayerweather "while writing, or in the midst of his writing,

" *made some sign or* used some word—I *don't*
" *distinctly recollect* which, indicating that.

Mr. Rollins.—" Q. State what he said.
(Continuing) " I DON'T REMEMBER WHAT HE
" SAID, *except* it was ' PSHAW,' and in connec-
" tion with what he said afterwards I drew a
" certain inference from that.
" Q. He said ' PSHAW ', or *something of that*
" character ? A. Yes.
" Q. An ejaculation ? A. Yes.

" (VI, 503.) *By the Surrogate.*—Q. What was
" he doing ? A. While writing his name.
" Upon finishing writing his name HE COM-
" PLAINED ABOUT THE POORNESS OF HIS SIGNA-
" TURE.

" *By Mr. Arnoux.*—Q. What were his
" *words ?* A. His words : ' THAT'S NOT A
" VERY GOOD SIGNATURE '.

" Q. Do you remember whether he replied
" *by words* to your statutory questions, as to
" acknowledging and publications of the will,
" or *simply* by A NOD ? A. I DO NOT.

" (VI 523.) You said that General Wood-
" ford had drawn a codicil, and sent you up to
" superintend its execution ? A. YES.

" Q. Did Mr. Fayerweather SAY ANYTHING
" TO THAT ? A. *Not* THAT I REMEMBER. I
" went on to read the paper.

" Q. You will *not* swear that he said *one*
" word, will you ? A. No.

Another witness, also a young clerk of Ritch's:

" III, 277 38 Q. (J. P. Browning, testified
" thus.) What was said, if anything, when you
" entered the room, by any of the party to

"Mr Fayerweather? A. Mr. Grout spoke to "Mr. Fayerweather, and then introduced me to "Mr. Fayerweather, saying that he had come "—that he brought a codicil to be executed— "or words to that effect; I am not repeating "his exact language, BECAUSE I DON'T REMEM- "BER IT, and he introduced me to Mr. Fayer- "weather. Mr. Fayerweather was lying there, "*with his eyes closed*, when we went in; and "he opened them and *looked at* Mr. Grout; "and then *after* Mr. Grout had greeted them, "HE CLOSED THEM AGAIN, and [illegible]en Mr. Grout "introduced me to him, he SIMPLY INCLINED "HIS HEAD A LITTLE.

"* * * 40 Q. *After* Mr. Grout had fin- "ished reading these papers, he moved, I think "he *asked* Mr. Fayerweather whether that was "the instrument which he wanted to execute, "AND MR. FAYERWEATHER *nodded* HIS HEAD "—THAT IS, *simply* INCLINED HIS HEAD.

"281. 49 Q. What did he ask him, in re- "spect to the paper? A. My recollection is "that Mr. Grout asked Mr. Fayerweather "whether this was a codicil to his last will and "testament, etc., * * * and Mr. Fayer- "weather *simply* SIGNIFIED his assent BY AN "INCLINATION OF THE HEAD.

"P. 315. 292. Q. Were such utterances, such "words as Mr. Fayerweather uttered on that "occasion, deliberate, and made with appar- "ent effort; or were they quick, and did they "indicate that the organs of speech responded "readily to the impulse of the mind? A. I "*cannot* SAY THAT MR. FAYERWEATHER UT- "TERED *any* WORDS.

"293 Q. Do you recall any sentence that "he uttered? A. I DO NOT.

"294 Q. Do you mean to say that such "communications as came from Mr. Fayer- "weather on that occasion were made BY "SIGNS? A. SIMPLY by an assent, indicated "BY THE NOD of his head.

"294 Q. In what manner did you learn "whether the proposition to which you took "the nod to be an assent, had reached his mind "and was comprehended by it? A. *Simply* "because HE *nodded*, *that* IS *all*.

"325, 394 Q. Did he *say* that he had that "morning given instructions to Mr. Vaughan, "etc.? A. HE DID *not say anything*—AS I "RECOLLECT IT.

"400 Q. What reason have you to suppose "that Mr. Fayerweather knew that Mr. Grout "came from Mr. Ritch's office? A. None ex- "cept that Mr. Fayerweather was acquainted "with Mr. Grout.

"401 Q. How do you know that? You "never saw them together? A. Because Mr. "Grout told me he knew him.

"402 Q. Is that the only reason? A. That "is the only reason; and the fact that Mr. "Grout greeted him as an acquaintance.

"429 Q. Did you hear Mr. Fayerweather "say, *after* he had written that name, 'PSHAW, "THAT IS A PRETTY SIGNATURE FOR A MAN TO "WRITE' or *any* equivalent word, indicating "dissatisfaction with his handwriting? A. I "do *not* recollect hearing him say *anything*.

"430 Q. You are aware, you heard what was "said, did you not? A. Yes—he may have "said it; but I have *no* recollection of it.

"440 Q. Did Mr. Fayerweather listen to the "reading of the codicil through by Mr. Grout? "A. I assumed that he listened.

"441 Q. He did not interrupt him, did he?
"A. I DON'T THINK HE INTERRUPTED HIM.
"442 Q. Are you positive of that? A. I
"KNOW he did *not stop* him. Mr. Grout read
"it through. I HAVE NO RECOLLECTION THAT
"HE INTERRUPTED HIM IN *any* WAY.
"445 Q. YOU HAVE NO RECOLLECTION THAT
"HE SAID *any* THING DURING THE INTERVIEW?
"A. I CANNOT REMEMBER THAT HE
"SAID ANYTHING.

Coaching Testamentary Witnesses—a Specialty.

BY RITCH'S PARTNER, ARNOUX.

Whether the fact that these two clerks did not remember better what took place in these five important minutes was not the fault of their employers may be gleaned from the sworn statement of Ritch's partner, Arnoux, of the firm of Arnoux, Ritch & Woodford, thus (I 498):

"I prepared the work of the examination of
"the witnesses.
"I required *each* of the several witnesses to
"the will and the codicils that were then
"within my control or reach *to give me a state-*
"*ment* of the facts in connection with the
"*factum* of the instruments which they wit-
"nessed.
"I had them afterwards reduce them *to*
"*writing*.
"I had them again, under the direction of
"one of our young men in the office, examined,
"and *that examination* was reduced to writ-

" ing ; and *after that* I called them into my " room to go over their examinations ;

" and to compare them with one another, so " that every witness should be thoroughly re- " freshed in his recollection, as to whatever " had been done or said in connection with the " execution of the several instruments that " they witnessed.

" I then said, ' now, the first thing I want to " do is to understand about these witnesses.' I " called them one at a time into my room and " *I examined them*, and went through the mat- " ter with each one just as if it was in court.

" Q. You have gone into that ? A. You want " it more in detail, and I am going to tell you " more in detail.

" *I acted as if I was both the direct and* " *cross examining counsel*, and I took them " up and went over *it all.*

" Then when I got through with it I said to " them, ' Now, I want *each* one *to write down* " *your own examination in your own way.*'

" And when that was finished *I brought for* " *instance Mr. Grout and Mr. Browning to-* " *gether in my room*, and I said, ' One of you " testifies that this codicil was executed " at about such an hour, and the other one " testified that he does not remember exactly " the hour.

" ' Now,' I said, ' can you bring to one " another's mind about the time ?'

" And Mr. Browning said, ' I recollect dis- " tinctly. I can fix the time because there " was a clock at the head of the stairs, or on " the landing of the stairs, and as I either

"went up or down stairs (I don't remember "now which he said) I turned around and "locked at that clock, and it was just such a "time, so many minutes after two o'clock, if I "recollect it right.'

"Q. Was he then on the way down stairs. "after the execution of the last codicil? A. I "don't remember whether it was going to or "from Mr. Fayerweather's room, but it was "at that time.

"He told me which it was, and I am only "showing you *how careful I was about it;* "and Mr. Grout said, I did not look at the "clock, but I do remember some circumstances "which occurred, which led him to acquiesce "in the exact time.

"Now, *the result* of that examination was "this, if I may say it, the Surrogate said that "Mr. Grout had been the *finest* witness he had "ever seen in his life in any litigation either "before him as Surrogate, or anywhere else, "because he knew the facts and was able to "account for every minute.

"Q. And because he was so well *coached?* "A. Because he was so well *coached.*

"And you can recognize, as a lawyer, that it "occupied a great deal of time.

"I was exceedingly careful in the course of "that litigation.

"*There was no hesitation on the part of the "witnesses in telling what had been done by "them in regard to the codicils.*

"Those of them that knew could tell the "room they were in, *the persons that were "present*, the place where the papers were "signed or anything about it; or they could

"tell right away that they *did not recollect.* "There was *no hesitancy* on the part of *any* "one of the witnesses in regard to what they "had done."

The third witness, Elizabeth R. Joyce, a young girl.

(VI, p. 275.) "Q. Did you have any conver- "sation with your uncle? A. No, none at "all.

"Q. Was he in a fit condition to converse "with you? A. No, I THINK NOT.

"*Mr. Coudert.*—Q. DID HE as a matter of "fact *converse* WITH ANYONE on that occa- "sion? A. At that time do you mean?

"Q. At that time, yes? A. No.

"Q. Except—did he say one single word "while you were in the room there, in connec- "tion with signing this paper? A. I think "*not.* He only answered the questions that "were asked him.

"Q. Now, how did he answer those ques- "tions? A. *Very weakly.*

"Q. Well, he was asked if that was his last "will? A. Yes.

"Q. Was it this or last codicils? A. "Codicil.

"Q. Now do you remember whether he an- "swered it by word of mouth, or with a nod? "A. I THINK HE SIMPLY NODDED.

"Q. And with regard to the other ques- "tions, do you remember whether he an- "swered them with a nod or by word of "mouth? A. I THINK NOT; I THINK JUST "BY NODDING.

"Q. And when he nodded, you took that to "mean *yes?* A. Yes, sir.

"Q. Except such answers as he gave, those "affirmative answers—did he express himself "either by word of mouth, or by nod, AT ALL? "A. I THINK NOT.

"Q. Did he give ANY sign of assent, in ANY "OTHER way, than either saying yes, or "*nodding*? A. Not that I remember.

"Q. Did he use any consecutive *words* on "any single occasion? A. I cannot remember "that he did.

"Q. So far as you now remember he did "*not?* A. Yes.

"Q. How long were you in the room? A. "Only a few minutes, *not more than five.*

"*P. 320. Cross examined by Mr. Parsons:*

"Q. Can you remember whether Mr. "Fayerweather spoke to Mr. Grout or bowed "to Mr. Grout upon his entering the room? "A. I think he *nodded* to him, though I cannot "be positive.

"Q. Can't you recall what even Mr. Fayer- "weather said to Mr. Grout, or Mr. Grout said "to Mr. Fayerweather immediately succeed- "ing this recognition? A. I think Mr. "Fayerweather said NOTHING.

"P. 323. Q. Don't you recall that, at the "time that Mr. Fayerweather signed his name "to the codicil, he made *some remark* about "it? A. To this *last* codicil?

"Q. Yes, to this *last* codicil? Didn't he "say "Pshaw," or im some way express dis- "satisfaction with his signature? A. *No.*

"Q. Have you any recollection about that? "A. I think he did *not.*

"324. Q. And did you know what it was, "that prevented the witnessing of this codicil "BY THE DOCTORS? A. I think MR. VAUGHAN "DID NOT WISH TO HAVE THE DOCTORS FOR "WITNESSES."

Was His Hand Held, as It Signed?

"(VI, 502, *GROUT.*) Q. Now *did you* in "ANY way *guide his hand?* A. *I did not.*

"Q. Did you suggest to him WHERE he should "put his hand to sign? A. I don't recollect "whether I pointed at the place opposite the "seal or not; but I *should probably do so.*

"Q. Did he, of his own motion, put his "hand down to the place where he should "sign? A. He DID.

"(501.) I did NOT TOUCH Mr. Fayerweather "*with my hand* at *any* time—I don't think "I EVER even shook hands with him.

"(III, 279, *BROWNING.*) In reply to 40 "Q. testified thus:

"He (Grout) handed him the paper with the "signature toward him—I mean so that he "could sign it,—and *I think he pointed to* the "seal and showed him—that is he had his "finger on the seal,—and showed him where "to sign——

"42. Q. On the seal? A. I mean opposite "the seal, because he was to sign opposite the "seal. And Mr. Fayerweather then signed "his name.

"44. Q. Was the signature appended to the "paper by Mr. Fayerweather his UNassisted "act, or did he receive ANY assistance in "writing his name from ANY of the parties? "A. *He received* NO *assistance.*

"45. Q. Was *his hand* HELD at all, or SUP-
"PORTED *at all*, by Mr. Grout; or by you; or
"Miss Joyce? A. *It was* NOT.

"Cross-examined in 394 Q. as to whether
"Mr. Fayerweather *said* anything about the
"talk he had with Vaughan that morning,
"and its purpose and result, he replied; A.
"*He did* NOT *say* ANYTHING as I recollect it.

"422 Q. You *deny* that he *took hold of* Mr.
"Fayerweather's hand and placed the pen
"where he should begin, do you? A. I DO.

Elizabeth R. Joyce testified thus:

"(VI, 358.) Now refresh you memory with
"all that has passed to-day; and when you
"went on the stand heretofore;—Are you able
"to state to the Surrogate whether or not Mr.
"Fayerweather was *able to see* sufficiently to
"place the pen at the right place on the
"paper? A. No. HE WAS NOT. Mr. *Grout*
"*had to* PLACE *his hand* WHERE HE WANTED
"HIM TO BEGIN.

"Q. Mr. Grout *took* HIS HAND *and placed*
"*it* at the right spot where he was to affix his
"signature; was that what you mean to say?
"A. Yes, sir.

(VI. 363.) *Re-cross by Mr. Parsons:*

"Q. *How confident are you* of your recol-
"lection that Mr. Grout *touched* Mr. Fayer-
"weather's HAND? A. I am *very sure* of it.

"Q. Well, suppose Mr. Grout should say
"that he didn't, are you so sure as to be WILL-
ING TO CONTRADICT HIM? A. *Yes*, SIR.

"Q. You *still* think that you were right
"about it? A. *Yes*, sir."
Vol. I, p. 556.

34 Q. Mr. Fayerweather nodded in response?

A. Yes. Then Mr. Grout made some remark that he had come to witness this paper, and went around to the side of Mr. Fayerweather's bed and stood at the side, at the head of the bed, at Mr. Fayerweather's side, and proceeded to read this paper which he had in his hand, the contents of which I know nothing of; and then he asked in the usual way if he wanted us to witness it or to be witnesses, and asked for a pen and ink, and there was none in the room; so I went back into the front room to get this pen and ink, and was gone just long enough to get it, and I brought it back and dipped the pen in the ink, and handed the pen to Mr. Grout, and he handed it to Mr. Fayerweather, and put it in Mr. Fayerweather's hand, and put his hand on the paper where he was to sign, AND SUPPORTED HIS HAND AS HE WROTE HIS NAME.

35 Q. *Who* did *that?*

A. Mr. Grout; and after that Mr. Browning and Mr. Grout and I signed our names also, and then we left the room.

36 Q. What did Mr. Fayerweather say while you were in the room?

A. He said NOTHING.

37 Q. Did not say *one word* even?

A. *No.*

38 Q. When Mr. Grout spoke to him or read to him, did Mr. Grout speak in an *ordinary* tone, or in a low tone, or in a loud tone?

A. Just an *ordinary* tone of voice.

David M. Carvalho, the Handwriting Expert.

"46 Q. He was asked in effect if Mr. Fayer-
"weather had impaired vision, could only see
"writing, with powerful spectacles, aided by a
"powerful magnifying glass; had no spectacles
"or glass; if he could form an opinion whether
"he could, unaided, have begun to write his
"name where it begins on that paper; or could
"have brought the strokes of the letters in
"such relation to the line, upon which the
"signature appears to be written, as there
"appears without assistance. He swore,

"A. The conditions related being true, while
"it would not be impossible, as a matter of ac-
"cident for the writer to have just exactly
"placed his pen at that spot; in my opinion,
"with the other circumstances connected with
"it, *it would have been among the impossibili-*
"*ties.* His HAND *must have been* PUT UPON
"THAT PAPER AT THE RIGHT PLACE.

"47 Q. In your opinion was the assistance
"*removed*, at any time, during the making of
"the entire signature? A. My opinion would
"be, sir, judging from my own experience,
"that the act of writing comes from what we
"call suggestion. The hand is placed on the
"paper, and becomes, for the time being, a
"machine. And, from force of habit, travels
"until it completes its work; unless unexpect-
"edly interrupted. The character of the
"handwriting illustrated in the so-called
"Fayerweather, leads me to the conclusion
"that, assuming that to have been a fair speci-

"men of Mr. Fayerweather's ability to write "at that juncture, HE COULD NOT HAVE "WRITTEN the D. B., which appears in front, "UNASSISTED; and that the assisting or sup- "porting hand *left when he had completed the* "D. B. *And the balance in his own work, sir.*

"48 Q. If the assistance given him were "that merely *of support*, without any attempt "to exercise ANY CONTROL OVER his will, in "making of the writing, would the result in "your opinion tend to better his signature or "not? A. It would IMPROVE what he might "be able to do himself, unassisted and "unsupported. But, on the other hand, "if his hand, *was* ASSISTED, so that in other "words, ANOTHER person's hand was on his "hand at the time he wrote, THE TWO WILLS "WOULD UNCONSCIOUSLY FIGHT AGAINST EACH "OTHER, and we would find INCORPORATED "habits of BOTH writers, and THEN instead of "being AN IMPROVEMENT ON his own hand "writing, the hand writing WOULD DETERIOR- "ATE, and it would lessen in quality as to the "hand writing of the person, who was sup- "posed to be writing it."

Albion M. Dyer, a Classmate of Grout's.

"1066. 17 Q. Did he (Grout) tell you that "Mr. Fayerweather at that time WAS IN NO "CONDITION TO RESIST? A. I carried *that* im- "pression away from the conversation.

"21 Q. Did Mr. Grout, on that occasion, "TELL YOU IN SUBSTANCE that Mr. Fayer-

"weather at that time was in no condition to "resist? A. *Such is* my impression.

"22 Q. What is your recollection? A. *My* "*recollection is* that he *did*.

"23 Q. Did Mr. Grout, on that occasion, "*tell you* in substance that Mr. Fayerweather "*was so feeble*, that he was UNABLE TO SIGN, "*without help?* A. My answer is this, I car- "ried away *that* impression from my conversa- "tion with Mr. Grout.

"25 Q. What is your recollection as to "whether or not Mr. Grout, on that occasion, "told you in substance that HE GUIDED Mr. "Fayerweather's *pen*, as he was *not capable* of "writing without assistance? A. In sub- "stance, *yes*.

"28 Q. Did Mr. Grout, on that occasion, "tell you in substance that he found Mr. "Fayerweather *so weak* that he COULD NOT "WRITE HIS NAME without help; and that Mr. "Grout ASSISTED Mr. Fayerweather in doing "so? A. I carried *that* impression away from "the conversation.

"141 X-Q. Mr. Dyer, are you able to swear "that, in that conversation which you had "with Mr. Grout, Mr. Grout *told* you that Mr. "Fayerweather was so *feeble that he was un-* "*able to sign without help?* A. I cannot "swear to the *words;* but, *in substance*, the "words made *that* impression on my mind.

"143 X-Q. Is that the *best* answer you can "make to my question? A. *Yes*, *sir*.

"144 X-Q. The *best* answer then *is* that what "Mr. Grout may have said made that impres- "sion on your mind, is that what you mean? "A. That is EXACTLY what I mean."

As to whether Mr. Fayerweather could see what he was doing when the Last Codicil was executed.

Vol. I, p. 562, *Elizabeth R. Joyce* testified thus:

"95 Q. And about his eyesight,— was he "able to read or write, without the use of "magnifying-glasses, or spectacles, at that "time? A. *No.*

"96 Q. Do you know what his custom was, "as to the use of glasses—did he use more "than one pair of glasses? A. He used his "ordinary eye-glasses, and the magnifying "glasses also."

II, 650, *John C. Baylor*, the butler, testified thus:

"50 Q. Could he see to read or write with- "out glasses? A. *No, sir.* He generally "wore *two* pair of glasses to read or to look at "anything. And also had a large, what do "you call it, a magni——

"51 Q. A magnifying glass? A. Yes, sir.

"52 Q. You knew of it? A. Yes, sir.

"53 Q. And he had to have two pair of "glasses and a magnifying glass to see to read? "A. Yes, sir."

(V, 488) *Vaughan* testified thus:

"Q. Let me ask you what was the condition "of Mr. Fayerweather's eyesight at that "time (Nov. 14, 1890)? A. It was *not* good. "But he could read by the use of glasses.

"Q. Didn't he use some peculiar kind of "glasses—large ones—to read with? A. I "don't recall that.

"Q. *He had a good deal of difficulty in* "*reading*, had he not? A. *Yes.*

"(III, 389.)—*E. M. Grout* testified thus:
"209 X-Q. Did Mr. Fayerweather wear "spectacles or glasses on that occasion? A. I "do *not* think so. But that has never been "inquired of me either in the Surrogate's "Court or here; and I cannot say with any "certainty. *I don't think he did.*
"210 X-Q. Did he have any magnifying "lenses, or use any while you were there? A. "I do *not* think he did. *I should have noted* "*that, because that is unusual.*

"III, 329.—*Browning, one of the three wit-* "*nesses to the last codicil*, testified thus:
"R-X-Q. Was Mr. Fayerweather wearing "spectacles when you arrived? A. I think "*not.*
"Q. 416. Did he put any on? A. I think *not.*
"417 Q. Did he use any maynifying glass? "A. *No.*"

(II, 563.) *Mrs. A. A. Reynolds* testified thus:
"140 Q. At that time was Mr. Fayerweather "able to see to write his name without glasses? "A. Mr. Fayerweather had not written his "name excepting to sign some paper, why for "months.
"141 Q. Well, he signed a paper on the 11th "of November? A. He would sign it with a "very strong glass and sometimes he put on "two glasses. But he always had a magnify- "ing glass there, right on that table. He could "sign his name, but not without—Oh he did

"sign his name, of course, frequently, but his "eyesight was so he could not write.

"143 Q. Did he have spectacles whenever "he wrote his name for the latter part of his "life? A. He had two or three pairs of spec- "tacles that the optician said were the strong- "est that could be furnished. That is why "Dr. Vedder got this magnifying glass for him.

"Q. In addition to those? A. In addition "to those.

"145 Q. Was that glass, or were any spec- "tacles, with him in the bed room that day, "November 15th, 1890? A. I do not know "that, because I was not there. The spectacles "were usually left in the library, in the drawer "that was for his private property. The drawer "of the library-table.

"146 Q. By the library you refer to this "room in which Mr. Butler and the others "were on the 11th of November? A. Yes, "sir. All papers belonging to Mr. Fayer- "weather were kept inthat drawer.

THE TESTATOR'S CONDITION, WHEN THE LAST CODICIL WAS EXECUTED.

Testimony of the Family Physician.

(VI, 474.—) Dr. Vedder testified thus:

"A. That *morning*, the morning of the fif- "teenth, I concluded that *he was dying*.

"P. 480. Then, in the same sense, in which "you used that expression, Mr. Fayerweather "was not a dying man until at least the 14th

"of November. A. Yes, sir; about *that* time, "he was *absolutely* dying.

"Q. And when you said to the reporter in "general terms that no dying man ought to "make a will, you didn't mean to be under- "stood as saying that a consumptive should "not make a will? A. No, sir.

"P. 481. Q. A year before he died, you "didn't mean that? A. No, sir.

"Q. Well, what *did* you mean, when you "used that general expression, that no *dying* "man ought to be called upon to make a will? "A. Well, when he was *absolutely* dying.

"* * * Q. I am talking now of the con- "dition of Mr. Fayerweather, *on the day that* "*he died*, when you saw him at *twelve* o'clock. "You stated then, that it would be *cruel* to "call upon him to sign any important paper. "You stated that he was *a dying man.*

"Now will you give me the symptoms, "which you detected in him on the fifteenth, "which led you to express that opinion? A. "I gave that before. Increased respiration; "decreased circulation, the extremities were "cold; and his stomach had given out; while "some of the other organs had stopped secret- "ing or acting.

"Q. The only organs then that were work- "ing were his heart and lungs? A. To a "degree, only to a certain degree.

"Q. And how was his breathing; did he "breathe with difficulty or with ease? A. Very "rapid, and very shallow.

"Q. You stated to Mr. Parsons, as you "have stated to me, that you did not agree to "go there *as a witness.* But that, in answer

"to the question whether you would be there, "you said, yes.

"Will you explain what you meant, by that "distinction? A. I merely said *yes. I "didn't say I would be there.* I merely re- "sponded, and said yes to the question. And "*I was not sure whether*, as I said before, I "would *be required*, or not—at *four* o'clock. "I THOUGHT MR. FAYERWEATHER MIGHT DIE "BEFORE THAT HOUR.

"Q. Did you mean to intimate by that, that "if you came at four o'clock, and he was still "in the *same* condition, you would act as a "witness? A. I would *not* act as witness, *if* "he was in *the same* condition."

(VI, 422.) "Q. Is it, or is it not, a character- "istic of a person, man or womon, in the last "stages of consumption, that a man or woman "will acquiesce in almost anything that is "asked? A. Well, a dying man—I say a "dying man, oftentimes will acquiesce in "almost everything.

"Q. In his distress, and in his clinging to "life, he will say *yes*, to almost anything, "won't he? A. I think so.

"Q. And how will he *signify* that ac- "quiescence? A. Well, usually *by nod- "ding* or saying no, or shifting his head. And "sometimes yes—if he was very weak.

Dr. Allan McLane Hamilton (II, 844) the Alienist.

In response to Vol. II, 29 and 30 Qs, which in substance gave Dr. Vedder's testimony, of the condition of Mr. Fayerweather at the time of the alleged signature of the last codicil, he swore:

"A. I believe that, from the medical symptoms alone, which are the only ones I have a right to pass upon, that this man WAS UNABLE TO EXERCISE HIS NORMAL mental functions from the time—*from eleven o'clock*, we will say, *that morning, until he died.*

"For the reasons that a condition of vital depression, and a loss of bodily vigor, which brought with it the symptom of inability to swallow, taken with the other things—in my mind, presupposes a condition OF EXTREMIS; and, in giving this answer, I put out all the previous questions, all the previous parts of the question. I believe that, from 11 o'clock—I fix *that* as the time after the Doctor's visit—UNTIL THE TIME OF HIS DEATH, he did NOT possess mental vigor, TO PERFORM A NORMAL ACT; FOR THE REASON THAT HIS POWER OF ATTENTION, his power of mental concentration, his exercise of judgment and reason, WERE IN MY OPINION AFFECTED BY THE TOXAÆMIA, that existed, and other weakness.

"31 Q. Do you believe that a man in THAT condition, would be able to act INTELLIGENTLY, in deciding whether or not to sign a paper, making the radical change which I have stated in the previous question, AT TWO O'CLOCK ON THE DAY OF HIS DEATH? A. I have already answered; I do NOT believe a man would be able to exercise ANY free will or perform an UNDERSTANDING ACT.

(II, 565) Mrs. Anner Amelia Reynolds testified thus:

"Q. * * * When did you next see Mr. "Fayerweather after seeing Mr. Grout and "Mr. Browning going down the stairs? A. I "went immediately to his room.

"153 Q. In what *condition* did you find "him? A. I found him *gasping for breath;* "and *not able to* say *anything.* His eyes "*closed.*

"154 Q. How long or how soon after that, "did he become apparently conscious again "and communicate with you? A. From that "time?

"155 Q. How soon after that? A. Not at "*any* time conscious after that.

"156 Q. No? A. *Until about 4*—or *half* "*past four* in the afternoon. It was after the "gas was lighted. It was the *first* time he "opened his eyes, to speak to any one."

Were there Instructions AFTER the Last Codicil was Made as to What to Do with the Residuary Estate?

(V, 472.) "Vaughan, when asked the hour "when the fourth codicil was burned, how "long after the execution of the fifth, testi- "fied thus-- A. *An hour or so*—I don't re- "member exactly.

(V, 465.) "Q. Mr. Vaughan, now state "what, if any thing, was *said* between Mr. "Fayerweather and yourself upon the subject "inquired about" —(Institutions)—"*subse-* "*quent to* the execution of the codicil? A.

" *We were to put our heads together*, and find " *other* places for the money."

(In the Surrogate's Court, when testifying to this, he left out the word " Other ".)

(VI, 724.) " He said thus :

" *After* the execution of the codicil, and " after Messrs. Grout and Browning had gone, " did Mr. Fayerweather say any thing to you " upon the subject of the execution of the " codicil ? A. The *only* remark I can recall, " was, *to put our heads together and find* " *places to put the money.*

(V, 697, 698.) " Mrs. A. A. Joyce Reynolds " testified thus :

"Q. Mrs. Reynolds, Mr. Vaughan has testified " that after the execution of the codicil by Mr. " Fayerweather on the fifteenth of November " and after he went down stairs with Messrs. " Grout and Browning and had returned to " Mr. Fayerweather's room, Mr. Fayerweather " said to him that we were to put our heads to- " gether and find other places for the money— " and he has testified that, after the execution " of the codicil, and Messrs. Grout and Brown- " ing had gone Mr. Fayerweather said to him " or made a remark to him, ' put our heads to- " gether and find places to put the money.' " Did Mr. Fayerweather make *any such* re- " mark to Mr. Vaughan on that occasion ?

" *Mr. Parsons.*—In her hearing ?

" *Mr. Root.*—I will put it first, 'in her " hearing '?

" A. Shall I answer the question ?

"Q. Yes. A. *No; he did not.*

"Q. I think you have testified in answer to "Col. James that there *never* was a time, after "Mr. Vaughan went downstairs with Messrs. "Grout and Browning, up to the time of Mr. "Fayerweather's death, that he was *with* Mr. "Fayerweather except in your presence? A. "*I say that.*

"Q. That is the fact? A. I believe it to be "true. * * *

"Q. Was there any conversation between "them, *after* the codicil was executed, and "before Mr. Fayerweather's death which you "did *not* hear? A. *No.*

"You have testified—if I understand it cor- "rectly—that you went out of the room twice, "after the execution of the codicil? A. Yes, "sir.

"Q. The first time was to go down to the "kitchen and burn the paper. The second "was to go down to the dining room? A. Yes.

"Q. At what time was it, that you went to "the dining room? A. At seven o'clock in "the evening, or thereabouts.

"Q. And I think you have said that Mr. "Vaughan did *not*, after that, return to Mr. "Fayerweather's room, till just the time he "was dying? That is so? A. *That is so.*

(V, 449). Vaughan testified thus: "A. I was present at his death."

"Burning" of the Fourth, or Butler Codicil, of Nov. 11th, 1890.

Vaughan's version of it:

"Q. At the moment I am speaking of, who "suggested the destruction of that paper? A. "I guess *I* did.

"Q. You did? A. *I believe I did.*

"Q. Did you go—do you know where she "destroyed it? A. In the kitchen.

"Q. Who went with her? A. I did.

" * * * I handed the paper to her; and "she threw it in the kitchen fire. * * *

"Q. Is this the fact—is it the fact that you "asked Mr. Fayerweather, holding the paper "in your hand, if it was his wish to have this "*paper* destroyed by you, and he *nodded* his "head? A. No—I think I asked him to tell "Miss Joyce to destroy the *paper*.

"Q. Well, how did he ask her? Did he *say* "yes? A. I *don't remember* whether he said "yes or not.

"Q. Well, why did you ask him to tell you; "couldn't he do that of his own motion, if he "desired? A. He had already told me to de-"stroy it.

"Q. Well, why didn't *you* tell Miss Joyce? "A. I don't know why.

"Q. And why did you ask Miss Joyce to de-"stroy it? Why didn't *you* do it? A. Well, "as he asked me, I thought he had better have "two, better than one.

"Q. Then it was you and Miss Joyce who "destroyed it? A. Well, Miss Joyce de-"stroyed,—I know,—the codicil.

"Q. You say you thought you had better

" have two than one; what do you mean? A. " So that there would be a witness to its de- " struction."

P. 672. " Q. The two of you co-operated in " the destruction? A. Yes, sir,——

" Q. Why was it better to have two, than " one? A. Well, because it is better to have " a witness to an act, than to do it all by your- " self.

" Q. And you thought, at the time, that " it was better to have a witness? A. Cer- " tainly.

" Q. Who handed the codicil to Miss Joyce? " A I did.

" Q. And it was in your possession then? A. " Yes.

" * * * Practically in my possession " from the time of its execution.

" Q. Was it in an envelope? A. Yes.

" Q. It was? A. Yes.

" Q. Was Miss Joyce able to see it, or did " she see? A. I should judge *not.*

" Q. Therefore, *she never knew what* she was " destroying? A. Well, I think she heard me " tell Mr. Fayerweather what it was in her " presence.

" Q. And then *all that Mr. Fayerweather* " *knew about it was what you said in her* " *presence*? A. Yes.

" Q. And that is *all* she knew about it? " A. *Yes.*

" Q. And it was *in an envelope*? A. Yes.

" Q. And the envelope, and all, was put in " the fire? A. Yes.

" Q. And to this day she has no *personal* " knowledge of what was in that envelope, has " she? A. *I don't know that she has.*

"Well, she *couldn't have*, could she? A. "*I don't think she could.*'

The Time of This Burning.

"(V. 472.) He also testified thus, as to the "time of this burning:

"Q. Do you know what has become of it? "A. It was burnt by Miss Joyce.

"* * * Q. On the afternoon of the 15th, "of November? A. Yes, sir.

"Q. After the execution of the fourth cod- "icil, which is now in evidence? A. Yes, "sir.

"Q. Several hours afterwards? A. *Not* "several hours.

"Q. How long? A. An hour or so. I "don't remember exactly."

Mrs. Fayerweather's Sister's Version of the Burning.

(II. 575.) Mrs. Anner Amelia Joyce-Reynolds, testified thus:

"206 Q. While Mr. Fayerweather was in "the condition you have described, following "the departure of Mr. Browning and Mr. "Grout, did Mr. Vaughan say anything, in "his presence, about burning any paper, and "if so, what did he say and what happened? "* * * A. He said to me in the sitting "room—I passed through from one room to "another, of course, I was in attendance on "Mr. Fayerweather, he said.

"207 Q. You were in attendance on Mr. "Fayerweather? A. Yes. And I passed

"through the sitting room, and he was there.

"Q. Who was there? A. Mr. Vaughan was "there. And Mr. Vaughan said: 'I want "you to go with me to the kitchen fire and "burn a paper', and I said 'I cannot go now, "Mr. Vaughan', and he said 'Well, as soon as "you can.' I went back to Mr. Fayerweather, "and attended to him, and when I could, in "a few minutes, I came back, and I said, "What did you want?', and he followed me "back into the room, and said 'Mr. Fayer-"weather';

"he put his hand into his pocket, and took "out an envelope, it was in a long envelope— "and said, 'Mr. Fayerweather, do you want "THIS PAPER destroyed?'

"HE NEVER OPENED HIS EYES, but *nodded* "his head.

"He was sitting as straight as I am now;

"and Vaughan said, 'Do you want Miss "Joyce to destroy it?'

"And he *nodded* his head, *the same as he* "*answered* EVERY *question during the day.* "Whether he meant yes or no, *it was by a* "NOD.

"P. 576. 209 Q. And what was done with "the envelope? A. He said: 'This paper, I "want.'

"210 Q. Who said? A. Mr. Vaughan.

"211 Q. You went with him afterwards? A. "I went with him down to the kitchen fire, and "Mr. Vaughan took the lid from the range, "took this envelope, from his pocket; and "said, 'Put that *envelope* into the fire', and I "did it.

"212 Q. Do you know what was *in* the en-"velope? A. *I do not.*

"213 Q. Was it *possible* for either Mr. "Fayerweather or yourself to know *what was* "*in it?* A. It was *never* mentioned *to Mr.* "*Fayerweather or myself.* It was *not possi-* "*ble* for us *to know.* * * * The *first* time "I knew that the paper destroyed was the "codicil of the eleventh, was when he was "asked *in Court*, what became of this paper, "he said, 'Burned by Miss Amelia Joyce.'

"219 Q. And have you just stated the cir- "cumstances attending its burning, if it was "burned? A. Yes; that is *all* there was to "the burning, *if it was burned.* * * *

"221 Q. Did Mr. Fayerweather give any "*other* directions on the subject, except what "you have just stated? A. HE NEVER SPOKE "A WORD. HE DID NOT EVEN OPEN HIS "EYES."

MR. FAYERWEATHER'S LAST WORDS.

He ordered Vaughan, his "executor and trustee",—to leave the room. And the house.

(VI, 633.) Vaughan testified thus:

"A. There was one time during that day "that he requested me to leave the room.

"Q. On the day of his death he asked you "to leave his room? A. Yes."

(II, 565.) Mrs. A. A. Joyce Reynolds continued her testimony, thus:

"157 Q. And what did he say then? A. He

"said—opened his eyes very wide, Mr. Vaughan "was sitting by the side of the bed. He "looked at me and he said, 'What is Vaughan "doing here?'

"I said that he was coming this way and "came in to see how you were.

"He says, 'Oh, no; he has heard I was "going *to die* to-day. *That* is why he is here. "*Vaughan, go out of the room! And out of* "*the house!*'

"He waved his hand like that; and then he "said to me, as I stood by the side of him, 'I "'wa-nt to to—te-ll you something; I c-a-n-t "—. That was the *last* words he ever spoke. "That was the *last* time he opened his eyes.

"158 Q. Did Mr. Vaughan immediately go "upon being so addressed by Mr. Fayer- "weather? A. He left the room and Mr. Fay- "erweather's eyes *followed him as far as they* "*could* in the passageway, and then he said "that to me, and I never to my dying day will "forget *the look* he gave me. He wished *to* "*say* something to me about *that* man and he "could *not* say it."

(V, 669.) The stenographer made the following note, after she had testified, "Mr. Vaughan, go out of the room". The note reads:

("In making the last remark, the witness "*waved* her hand *from* her, *outwards and* "*upwards*".)

"Q. Did Mr. Fayerweather wave his hand "*as you did?* A. Waved his hand. Said, "'Mr. Vaughan,—*Go out of the room!*' He "was perfectly able to move his hand.

"Q. Did Mr. Vaughan say anything? A. "He said, 'I will go, Mr. Fayerweather'.

"Q. And did he go? A. He did.

"Q. Did he return to the room again? A. Not "until Mr. Fayerweather died, or just before "he died. * * * Perhaps might have been "ten minutes before his death."

(V, 449.) Vaughan testified thus: A. "I was "present at his death".

What Beardsley did after receiving the "present" of $50,000 for himself and $75,155 for his children.

"(VI, 1717.) Vaughan testified thus:

"Q. Were you with Judge Beardsley that "afternoon or that evening of the day "Mr. Fayerweather died? A. I think Judge "Beardsley was there before dinner. I re- "member now, and I think after dinner Mr. "Beardsley and I walked down Fifth Avenue "together on one side and came up on the "other. I think we went down as far as 23rd "Street.

"Q. Can you not fix the hour—the hour "when that occurred? A. It was dark; it "must have been seven or eight o'clock.

"(V, 515.) Q. Now, did you ever tell Judge "Rollins that either Mrs. Achter or Mrs. "Emma S. Fayerweather was entitled to any "portion of the Fayerweather estate *in addi- "tion* to the legacies given them by the will "and codicils? A. *Not* that I recall.

"Q. Did you ever tell *Judge Beardsley* so? "A. *Yes.*

"Q. You say you *did*? A. *Yes, sir.*

"Q. When? A. I *don't remember* when.

"Q. What month? A. I can not recall the "month.

"Q. Where was it? A. I do not know "where.

"Q. What did you tell Judge Beardsley "they were entitled to besides the legacies "under the will and codicils? A. *I told him* "*of this* $100,000. * * *

(*That* was to "*Beardsley's wife—not* to her sisters.)

"Q. But did you tell Mr. Beardsley of the "$100,000 in this paper Exhibit W? A. *Yes,* "*sir, and showed him the paper.*

"Q. *And showed him the paper*? A. *Yes,* "*sir.*

"Q. And wasn't that soon after Mr. Fayer- "weather's death? A. I cannot give you *the* "*date.*

"Q. It was in 1890, wasn't it; the same year "that Mr. Fayerweather died? A. I cannot "tell *that*.

"Q. What is your best recollection? A. I "don't know the date.

"Q. Was it *before* Mr. Fayerweather's "death?

"*Mr. Arnoux.*—*We* will *object* to it as im- "material.

"Objection sustained.

As seen above (Vol. II, p. 587) $125,155 in securities were delivered to Beardsley the day before Mr. Fayerweather died, so that he should *protect* the interests of Mrs. Fayerweather.

Beardsley Writes to Vaughan.

The following correspondence right after the death will aid in showing *how he did so.*
Vol. II, Page 152.

"BRIDGEPORT, Connecticut.
"November 25th, 1890.

"*My Dear Mr. Vaughan:*

"I have received from Mr. Myrick, sent at "your request, the amount of tax and water "rate.

"I would be obliged if you would ask Mr. "Myrick this additional information:

"Cost of hay, grain, etc., used at stables; "for repairs, etc., to harness, carriages, etc., of "pew at church; of heat at house and stables. "In short, I want information as will enable "me to set down and show Aunt Lou (Mrs. "Fayerweather) what her running expenses "(exclusive of table and servants and clothes) "*will be apt to be.*

"I AM ENGAGED IN THE EFFORT TO PERSUADE "HER that SHE IS NOT LEFT POOR, BUT HAS "BEEN LEFT SUFFICIENT TO LIVE AS UNCLE "DID.

"I enclose two bills, which I suppose you "should have; and which Aunt Lou handed "me yesterday while I was there.

"I have sent my wife's waiver to Mr. Ritch; "and have sent the one for her two sisters to "them; and Aunt Lou promised to send hers "yesterday.

"There is an adverse influence from her "family. *But with Miss Joyce's help, I feel "sure it will not avail.*

"Yours very truly,
"MORRIS B. BEARDSLEY."

Ritch Writes to Beardsley.

(Vol. IV, 244.)

"NEW YORK, November 28, 1890.

"*Dear Judge:*

"I have not received the *waivers* from Mus-
"catine, but on Wednesday came a telegram
"from H. B. Achter asking for a copy of the
"will, certified by the Clerk of the Court.

"I answered that I could not get a certificate
"until the will was filed for probate. But that
"I had given you a correct copy, which, I
"understood, had been sent to Iowa.

"I HOPE THAT THEY WILL NOT ACT UNDER
"BAD ADVICE, AND CAUSE DELAY BY OBJEC-
"TIONS, WHICH COULD HAVE NO OTHER RESULT
"THAN DELAY, with expense and the loss of
"the $1,000 each, legacy tax, which for myself,
"I would be glad to make good to them, be-
"lieving that it would be Mr. Fayerweather's
"wish, *in case they deal with us as friends,*
"*and not enemies.* I fear that the will will
"not be ready for probate on Monday. And,
"as I would not wish Miss Beardsley to come
"to the city on an uncertainty, I suggest that
"she wait, subject to telegram from me.

"Yours truly,

"THOS. G. RITCH.

"Hon. MORRIS B. BEARDSLEY."

Ritch writes again to Beardsley.

RITCH'S "KINDNESS" TO THE WIDOW.

(Vol. I, p. 620).

"Private."

ARNOUX, RITCH & WOODFORD,
18 Wall Street,
NEW YORK, December 13, 1890.

"Dear Judge:

"*In kindness to Mrs. Fayerweather* and "Miss Joyce they ought in some way to be in- "formed of the existence in my possession of "a *prior* will, much *less favorable to* both of "them than the present; and with no *dis-* "*cretion* whatever to the executors, $800 per "year to Miss J., and the income of $300,000 "to Mrs. F. in addition to real estate.

"Trust estates for life to the daughters of "William Fayerweather *except* $25,000 to *Mrs.* "*Beardsley.*

"It is a *delicate* position for me; and so I "put you in possession of this information, "*with liberty to use it* as *you* deem proper.

"Sincerely *trusting Mrs. Fayerweather* may "SOON SEE THE HOPELESSNESS AND UNWISDOM "OF A CONTEST with those who desire to be "her *friends;*

"I am very truly yours,
"THOMAS RITCH."

"How he *did* "use" it, appears as follows:

Ritch as the Widow's "Friend".

(II, 894.) Mrs. A. A. Joyce-Reynolds testified thus, referring to this letter:

"Q. Did Mr. Beardsley read that letter or "show it to Mrs. Fayerweather? A. He did.
"* * * *He read it to her.*
"Q. In your presence? A. Yes, sir.
"Q. That was in December, 1890, after the "13th? A. Yes, sir."

Ritch's "Kindness".

This letter from Ritch to Beardsley, which he read to Mrs. Fayerweather, thus told her that, "*in kindness to her*", there was a "*prior*" will "*much less* favorable to her" than the 1884 will; "with *no discretion* whatever to the executors; and the income of $30,000 to Mrs. Fayerweather, in addition to real estate"

Let us see if these statements of Ritch *were true.*

Total estate upwards of.....		$6,000,000
Under the Will of 1880.		
Total personal legacies.....	$185,000	
Set aside to produce her annuity.....	800,000	
Set aside to produce A. A. Joyce's annuity of $800..	15,000	
Expenses of administration,	200,000	
Total.....		700,000
Net balance of Estate.....		$5,300,000
One-half of this to colleges, namely..		$2,650,000

As this will gave nearly all the estate, *upon its face* to colleges; and Chapter 360 of N. Y. Stats. of 1860, make such a will *void*, as to *one-half* of the net estate; and as to that void half, he thus died *intestate;* and his widow inherited one-half of that, or	1,325,000
and the house, its contents, site and stable, worth.....	$100,000
And her commissions as executrix—	
Not in Ritch's "*discretion*",—this time, would have been about.....	60,000
Her total principal under this "*prior*" 1880 will would have been about....	1,485,000
Her income from the $300,000 set aside was.....	18,000
Under the Will of 1884.	
House and contents, and stable.....	$100,000
Cash	10,000
Total principal	$110,000
Income—*if* Ritch saw fit to give it,—under his "*discretion*", not to exceed	15,000
Excess of principal to her under the "prior" will.....	1,375,000
Excess of income under the "prior" 1880 will.....	3,000
Plus whatever Ritch's "*discretion*" reserved out of the.....	15,000

Which was the Better Will FOR BEARDSLEY?

Ritch, in said letter of December 13, 1890, in

describing his "*delicate*" position, said "Trust estates for life to the daughters of William Fayerweather, *except $25,000* to Mrs. *Beardsley*.

The will of 1880 gave her.....	$25,000
The will of 1880 gave her children the income from.....	25,000
Total under this "prior" will to Beardsley's family.....	50,000
The 1884 will gave his wife.....	100,000
The alleged "*morning*" memorandum of November 15, 1890,—which was *not* produced at *this* trial,—(as Vaughan said he was unable to find it) (Vol. II, pp. 55-58), gave Mrs. Beardsley *another*.....	$100,000
The Deed of "gift" of Ritch, Bulkley and Vaughan, Paragraph 3rd, reads: "We give to Lucy J. Beardsley, wife of Morris B. Beardsley", said last $100,000.	
Total to Beardsley's family, *under 1884 will*, and deed.....	$200,000
Total to Beardsley's family, under 1880 will.....	50,000
Total Beardsley *advantage* under 1884 will and deed, *so far as Ritch told Beardsley*.....	$150,000

Ritch's Interest, Under Each Will.

Commissions as executor, under 1884 will, about.....	$60,000
Residuary legacy, which he swore was "absolute", one-third of $3,500,000, namely, about.....	1,200,000

Conditional legacy under 1884 will, drawn *by himself*, of the one-third of the $2,100,000 given to the 20 colleges,—always in his "discretion" to "withhold", as he saw fit,—namely	700,000
Total to Ritch under 1884 will and codicils, all drawn *by Ritch*.....	$1,960,000
Had he succeeded in carrying the estate under *this* will, and its first three codicils, *drawn by him*, unaffected by the fourth, or Butler codicil, and by the *fifth*, or Vaughan codicil,—instead of one-third of said absolute residuary legacy,—he would have had *one-half*, or.....	$1,750,000
And of said *conditional* $2,100,000, he would have had	1,050,000
Total Ritch might have had, under 1884 will, *drawn by him*, *had he kept Vaughan out*,—namely, said two legacies, and his commission of $60,000.....	$2,860,000
Vaughan's interruption—which made Ritch turn as *white as paper*.—thus *cut down* his possible receipts by...	$900,000
While the "*prior*" will, *not* drawn by him, yet which he thus held over Beardsley, and the widow, would have *reduced Ritch's* total receipts from this estate to about.....	$60,000

If he *had* kept Vaughan out, and Bulkley *had*

died before the testator, and the latter had not *known* of his death, how much would Ritch THEN have gotten? Ritch, who until Vaughan got copies of them from him, when he turned as white as paper—had the ONLY proof that the bequest of the whole residue was in truth *absolute*. A question which may be worthy of a moment's reflection by your Honors in passing is this: *Why could not Ritch then have had the entire $6,000,000*—less the $300,000 or so of personal bequests—and this $95,000 to hospitals?

Why the Widow gave Her Power of Attorney.

"*The hopelessness and unwisdom of a contest with* those who desire to be her *friends*" had results which the widow did not understand then, nor when she released for ten cents on the dollar.

But which this Court will.

And will see, in part, what she *meant*, by saying as follows, in her Power of Attorney, when she came to realize how her "*friends*" had treated her (IV, 279):

> "AND WHEREAS, my said *passive* acqui-
> "escence in *and submission to the* terms and
> "conditions of said compromise and discon-
> "tinuance *were due to* my condition of physi-
> "cal weakness, the result of protracted illness,
> "*whereby I was at the time of said compro-*
> "*mise and discontinuance, and long after-*
> "*wards, continued to be unfit and practically*
> "*incapacitated to transact business, and to*
> "*rightly understand the terms of said com-*
> "*promise*, and its consequences to myself and

"those dependent upon me; which conse-
"quences I *now* understand, *and deplore*, and
"am *no longer* willing to acquiesce in, or be
"bound by."

It will be borne in mind that said $200,000 to the Beardsleys was *in addition to* the "presents" $125,155, viz., the $50,000 to Beardsley and $25,000 to each of his three children, which Beardsley had already received in securities the day before Mr. Fayerweather died.

The purpose of which gift, is thus explained by Mrs. Fayerweather's sister, Mrs. A. A. Joyce-Reynolds:

(II, 561.) "He said, at all times, he wanted
"me to call upon Mr. Vaughan, *Morris Beards-*
"*ley*, and Mr. Myrick, for anything that I
"might want to know. That Mr. Myrick
"knew all about his affairs, and the others
"would give me all the information I desired.
"BECAUSE HE HAD PAID THEM FOR DOING IT.
"And I was *not* to offer them any money. He
"said he had given Mr. Vaughan $25,000; Mr.
"Myrick, $25,000, and Mr. Beardsley, $50,000.
"That I was to go to them FOR ANYTHING I
"WANTED. He said, 'I think Mr. Vaughan is
"my friend. I know Mr. Bulkley to be an
"honest man' (Ritch, not classified)."

How Beardsley *earned* said $125,155; and what brand of information he furnished the widow for it, at the "*delicate*" suggestion of her "*friend*" Ritch, may be somewhat told from this sample of it.

Also, into what sort of a nest of "*friends*",—

(*well-paid* "friends"),—she found she had fallen, when she executed her said power of attorney.

SECOND.

Statements of Facts as to Events AFTER the Testator's Death. Upon Which Arise Questions as to the Alleged Releases of the Widow and Next-of-Kin.

Mrs. Lucy Fayerweather, at the time of her husband's death was about sixty-five years of age (V, *fols. 1298 ; 2724*).

She had been an invalid, suffering from diabetes, since 1876, and continued so until her own death from said disease, July 16, 1892 (V, *fols. 2325–8 ; 2724*).

Her sister Miss Anner Amelia Joyce, was her nurse (V, *fols. 2730–1*) and Dr. John A. Irwin, her attending physician (*fols. 2325–6*).

Her bodily strength was considerably reduced by her disease. Her general condition was one of physical and nervous *depression*, *weakness* and irritability. She passed large quantities of sugar. She suffered from annoyance, and was nervous, and irritable, but mentally she was clear. As a rule she took short *drives* in her carriage on fine days; but *she never walked out.* Her physician was in *daily* attendance upon her.

These conditions continued during the *whole* time from her husband's death to her own.

She attended to her own business to the day of

her death, and was able to go out *in her carriage* to within a week of her death. Her disease *was aggravated*, about the time of Mr. Fayerweather's death, and, subsequently, was *very much* aggravated pending *the contest* over his will (*V, fols. 2328–34; 2354; 2380–81; 2815; 2819; 2914–15*).

Ritch knew her very well *and knew her condition of health* (V, *fols. 1274; 1298–1304*). So did Vaughan (V, *fols. 2036–7*). Mr. Bulkley saw her only when the will was read (V, *fols. 2706–7*). Her *condition* however, as testified to by Dr. Irwin, *is not disputed* (V, *fol. 2732*).

The Widow's Support was Dependent upon the "DISCRETION" of Ritch, Bulkley and Vaughan.

Mrs. Fayerweather *was dependent* for her support *upon* her husband's estate, and *the liberality of* Messrs. Bulkley, Ritch and Vaughan, the executors and trustees (V, *fols. 1294–8; 2041–2; 2733*). They were made by the will *trustees of* the fund, from the income of which her maintenance and support were to be provided, and payments of said income to her were to be made "*in their* DISCRETION" (V, *fols. 3570–1*). This trust they all accepted (V, *fols. 1293–4; 2035–6*).

Ritch Read the Will.

After the funeral of Mr. Fayerweather the will and codicils were read to Mrs. Fayerweather, Miss Joyce and Judge Beardsley, by Ritch, in the presence of Bulkley and Vaughan, at the residence,

No. 11 East 57th street. *But the private memoranda were not read or mentioned* (V, *fols. 1371-3; 1453-4; 2706-7; 2897-1901; 2912-13*).

While Reading the Will to the Family Upon the Return from the Funeral Ritch Leaves Out One Clause?

Did He Cut Off HIS Sister-in-Law's Annuity,—If She Married?

(VI, 871.) Ritch testified thus:

"Q. * * * Did you call, Mr. Ritch—
"Miss Joyce's attention to the clause of the
"will, which limited the annuity in her favor,
"to the period of her remaining *unmarried?*
"A. She called my attention to it.
"Q. Did not Mr. Fayerweather direct the
"insertion of that restriction of the will? A.
"Yes. I don't know at the time that I talked
"with *her* about it. But I afterwards found
"it pencilled in the will. I found a pencilled
"memorandum *of mine*,—evidently from his
"instructions from the old will.
"Q. That *that* condition should be attached
"to the legacy? A. Yes.
"Q. Did you say to her that you knew that
"Mr. Fayerweather was not aware that there
"was any such restriction? A. *No.* What I
"said to her about it was that I was sorry.
"She said that if Mr. Fayerweather *had had*
"*his attention called to it*, when that third
"codicil was prepared, he would have *removed*
"the restriction.

"I told her that it was very probable that
"he would have done it; that *nothing was*
"*said about it by either of us*, at the time;
"and that *probably* the fact that it was
"worded in the form that it was, was due to
"the habit of a lawyer—where it relates to
"the same matter—to make it subject to the
"same conditions as the original provision,
"without thinking what these conditions
"were.
"Q. Did you tell her that it was *customary*
"for testators to restrict legacies to others
"than their wives, unmarried persons,—to at
"tach a condition of that sort to legacies?
"A. I did not.
"* * * Q. And Mr. Fayerweather told
"you he wanted Miss Joyce's legacy re-
"stricted, so that she would forfeit it upon
"marrying, did he? A. I don't think I could
"have said *anything* to him about it.
"Q. How did it get into the will then? A.
"*Except by—that he didn't speak about it.*
"Q. But how did it get *into the will?* A. At
"the time he brought to me the pencilled
"memorandum of instruction, my impression is
"that, *that* contained the words. If you will
"give me the memorandum, which was put in
"evidence where the provision for his wife is
"made Twelve thousand dollars, I think in that
"memorandum is the statement about Miss
"Joyce, so much money, if she remained single.
"I think it is in that memorandum.
"Q. Did he get that suggestion from you?
"A. He did not.
"Q. That came out of his own head? A. I
don't know.

"* * * P. 873. I believe that if Mr. Fayer-
"weather—I know that if Miss Joyce had
"asked, *at the time the codicil was made*, with
"regard to such a thing; he—with the feeling
"that prompted the execution at *that* time in-
"creasing her amount—he would have done
"that for her.

"Q. Can you explain why he did not? A.
"*His attention was not called to it* evidently.
"Miss Joyce said that that was the
"reason * * *

"Q. Did you read, after Mr. Fayerweather's
"death, these various testamentary papers to
"the family, and to the executors? A. Yes.

"Q. Did you read them accurately? A. I
"have no doubt I did.

"Q. * * * Did you *omit*, in reading the
"provision in respect to Miss Joyce, the condi-
"tion that was attached to that legacy? A. I
"think not. *I know* I could *not* have done
"that.

"(II, 939. Mrs. A. A. Joyce-Reynolds testi-
"fies thus:) 'There was a clause in the will
"which was NOT read, as regarding me.'

"Q. The sixth article begins, 'I give and be-
"queath unto Anner Amelia Joyce, for and
"during her life, or so long as she remains un-
"married? A. THAT was NOT read. THE MAR-
"RIED PART WAS LEFT OUT.

"Q. Out of deference to your feelings? A.
"Yes, sir.

"* * * *I was told it was before it was*
"*read.* * * *

"P. 940. I saw it in the papers, when it
"came out. I was told, prior to the reading

" of the will, first, by Mr. Vaughan, at seven " o'clock, that time in the dining room—at " seven o'clock in the evening previous to Mr. " Fayerweather's death—that that clause was " in the will regarding me. I had a talk with " Mr. Ritch about it, *before* the will was read, " I heard it a second time. I thought it rather " strange. I did not want it put in the papers. " I hated to have the thing published in the " papers, because it was a stain on Mr. Fayer- " weather's name, his honor, that was the only " thing I cared about. I felt extremely sorry " that the world should know that that thing " was in the will.

" (II, 578.) She testified thus:

" 228 Q. Did Mr. Ritch have any conversa- " tion with you *just prior to* the reading of " the will? A. He did.

" 229 Q. You and he alone? A. In the " parlor. He called me into the parlor, " *and he said to me*, that there was a provision " in the will regarding my annuity, *if married.* " I was *not* to receive it after I married, and he " said that. I asked him if *Mr. Fayerweather* " directed that, *and he said, No. But when* " *he read the will, it escaped his notice.* At " the time he wrote, he did not know me; or " did not know what relation I was to Mr. " Fayerweather, but as I understand the case " now, I know Mr. Fayerweather could not " have understood it when I read the will to " him. He told me that Mr. Woodford, as " long as he lived, I should have that annuity, " even if I married to-morrow; and if I should " die, Mr. Woodford has charge of my affairs, " and he will see that you have it.

"230 Q. Did he state how he came to put in "the will? A. He said it was a *customary* "way of drawing a will, when you give *an-* "*nuities* that way.

"231 Q. Well, did he *read that clause* in "the will afterwards, before the people? A. "*He said*, Now, to spare your feelings, I will "*not* read that clause. He was very considerate.

"232 Q. And he did *not* read it? A. He did "NOT read it."

(II, 574). She testified thus:

"198 Q. Was anything said by Mr. Fayer- "weather, at the time Mr. Vaughan read his "will to him, in regard to that provision of the "legacy to you, which provided for that legacy, "so long as you remained unmarried; and if "so, what? A. I heard a remark which I did "not, at that time, understand—I understand "fully now. *I heard Mr. Fayerweather say, "in a very excited manner, 'I never did it. "I never did it. That girl has given her life "for me.'* I know *now* what it meant.'

Petition Filed for Probate.

The petition for the probate of said will and its four *unburnt* codicils was filed in the office of the Surrogate of the city and county of New York, Dec. 5, 1890 (V, *fols. 1673-4*). It was signed by all the executors, and declared that the widow and heirs-at-law and next-of-kin had all *waived* service of citation, and *consented* that the will and four codicils should be admitted to probate. It therefore prayed for such probate (V, *fols. 2065-78*). The will and codicils and copies thereof were annexed to said petition (V, *fols. 2079-2120*).

Ritch swears that the residue was given to him, Bulkley and Vaughan, and that none of them were related to the Testator.

There was subsequently added thereto a paper, verified by Ritch, Dec. 10, 1890, purporting to give a "full and correct list of the names and residences "of all persons and bodies, who are in any way en- "titled to any legacy, devise, interest, or estate, under "or by virtue of the will of said deceased, or from "said decedent, together with the relationship, or "otherwise, of such persons to said decedent, and "the nature, value and amount of such legacy, de- "vise, interest, or estate to the best of deponent's "knowledge, information and belief" (V, *fols. 2121–36*). The list, thus verified, after naming all the specific devisees and legatees, with their relationship, residences, and the nature and value of their interests concludes: "*The residue of the estate, the value of which is unascertained, is given to* JUSTUS L. BULKLEY, *of New York City*, THOMAS G. RITCH, *of Stamford, Conn., and* HENRY M. VAUGHAN, *of Orange, N. J., none of whom are related to the testator*" (V, *fols. 2125–36*). There was *no* suggestion that the same was affected by any *trust*, or that *any* person, or corporation, except *themselves*, had *any* interest in said residue (*fols. 2127–36*).

Vaughan's and Ritch's Professions of Friendship to the Widow.

Vaughan called several times upon Mrs. Fayerweather at her house soon after her husband's death. He *professed* to be her *friend*, and told

her that she could have from the estate *all* the money that *she desired*, as far as it was in his power to give it to her (V, *fols. 2052–6 ; 2063–4*).

About Dec. 11th or 12th, 1890, Ritch called on Mrs. Fayerweather, and said to her that he had been her husband's *friend* and would be *hers;* that any service he could render as a lawyer he would ask her to call on him for, *as a part of his duty;* that he expected, *the next day, to give her a cheque for $10,000*, and advised her to deposit it in the Fifth Avenue Bank. He said that the executors did not wish her to have any anxiety with regard to money matters, or to trouble herself with regard to the payment of bills ; that they wanted her to live there, keep up her establishment, *as she was accustomed to*, and have no care, or anxiety, about it. She asked him to *repeat* these statements, and he did so, again giving her these assurances (*fols. 2681–5 ; 2736–7*).

Objections Filed to the Probate.

December 15th, 1890, Mrs. Fayerweather, by COUDERT BROS. acting as her attorneys, filed objections to the probate of the said will and codicils, upon the usual grounds, viz.: *Non factum*, duress, undue influence, incapacity and non-compliance with statute. The verification was insufficient, and the same objections, duly verified, were re-filed December 17th, 1890 (V, *fols. 1471–3 ; 2137–52*).

January 17th and 19th, 1891, Mrs. Beardsley, Mrs. Achter and Emma S. Fayerweather appeared in said probate proceedings by Hon. DANIEL G. ROLLINS, their attorney. Their previous consent to said probate was withdrawn. January 21, 1891, they filed objections to the probate of said four codicils substantially similar to those filed for Mrs.

Fayerweather against both the will and codicils (V, *fols. 1475-6 ; 2165-80*).

Thirteen colleges and two hospitals also appeared by attorneys, but did not file objections (V, *fols. 1675-80*).

The Probate Contest.

The trial of the issues, so joined, was had before Surrogate RANSOM, February 2nd, 4th, 5th, 12th 16th, 18th, 25th and 26th and March 2nd, 1891 V, *fols. 1681 ; 2241-3*).

The widow was represented in said trial by Frederic R. Coudert and Daniel J. Holden, and the next-of-kin by Daniel G. Rollins (V, *fols. 1683-5*).

Bulkley, Ritch and Vaughan were represented by John E. Parsons and William H. Arnoux (V, *fols. 2207 ; 2366 ; 2948*).

Ritch was examined, as a Surrogate's witness, by contestants' counsel; and the notes, letters and these memoranda were put in evidence on his examination before the Surrogate. Since the close of his examination they have remained in the possession of the Surrogate, whence they were produced on the trial of this action (V, *fols. 1226-7 ; 1562-3 ; 2254-5*).

Vaughan was also examined as a Surrogate's witness by contestants' counsel (*fol. 1829*). His *entire* testimony taken before the Surrogate was also put in evidence on the trial before Justice Truax, to show that although he told *parts of* the morning talk of the day Mr. Fayerweather died,

he did *not* testify to *any such* remarks by Mr. Fayerweather that forenoon, as he testified to on the trial before Justice Truax about *selecting* "MORE" or OTHER *institutions for benefit;* or giving the surplus money to OTHER institutions (V, *fols. 2995–3007; 3054–3455*).

Concealing the Contents of a Codicil.

It was also shown on this trial that he did NOT produce before the Surrogate THE ENVELOPE (*Exhibit Oa*) to the letter from Ritch to Miss Joyce on which he made the memorandum at said *morning* interview, "MORE *institutions for benefit*" (V, *fols. 1978–84; 2017–26; 2989–94; 3002–3; 3007; 3054–5*).

So that the part of this *morning* talk as to what the testator said must be done with his residuary estates was unknown to these ladies and to their counsel when they agreed to withdraw their objections to this probate; when they agreed to release, and when they released.

He did *not* divulge the contents of the burned codicil; Mr. Butler prepared it, stood upon his privilege as an attorney, and *refused to testify* (V, *fol. 2882*).

Vaughan and Butler thus succeed in concealing so much of the contents of this "burned" codicil as Vaughan swore only two months after its execution that he did not remember.

The contest in the Surrogate's Court was upon the objection that the will and codicils had been obtained by undue influence (V, *fols. 2708; 2949–50; 3523*). The determination of Mrs. Fayerweather to resist the probate, originated from the suspicion that Mr. Vaughan had unduly influenced

her husband to make some of these testamentary papers (V, *fol. 2362*).

Concealing the Secret Trust.

February 18th, 1891, when the proponents rested their case, the contestants' counsel argued that probate should be denied, on the ground that the proponents, under the circumstances, were bound to show something more than the *factum* of the will; that the relations and circumstances of the parties were such as to require explanation, as well as proof, why this enormous estate had been diverted, not only from the widow and next-of-kin, but from the colleges, which had been the cherished objects of the testator's bounty (V, *fols. 2948; 3041; 3456-3534*). Mr. Coudert, at the close of his remarks, which were put in evidence, said: "*Of that we have not a single word of explanation*" (V, *fols. 3533-4*). The Surrogate, however, at the close of the argument decided that a *prima facie* case had been made out; that he should admit all the papers to probate if the proofs stopped there, and that the burden was upon the contestants to show undue influence and fraud (V, *fols. 1759-60; 2208-9; 2948-51; 3043-4*).

Mr. Coudert Demands Their Occult Intentions.

Mr. Coudert, in the course of his argument, alluding to the first codicil, drawn by Mr. Ritch, in which he had written himself and Bulkley down as sole residuary devisees and legatees, said: "It

"won't do to say that he had the best motive; "that what was in his mind was to cheat the law, "and the law of 1860 was there, and that he "meant to get rid of it. *He hasn't said so. If* "*there are any* OCCULT *intentions* WE SHOULD "HAVE THEM" (V, *fols. 3490-91*).

But Bulkley, Ritch and Vaughan and their counsel DENIED any "occult intentions." *They insisted from first to last*, as they *still* insist, that the devise and bequest of the residuary estate to them individually were ABSOLUTE, to do with *as* THEY *pleased*, and *were* NOT affected by ANY trust *whatsoever* (V, *fols. 3308-9; 2054; 2701-3;* Answer, *170-238*).

Getting Rid of a Grave Charge.

The charge of *undue influence*, however, before the Surrogate, was a serious matter. Its principal *force lay in* the accusation that they had obtained their friend's millions to enrich *themselves*. It became necessary *to disarm* this accusation by denying any *sordid* motive. They could *thereby* save *their reputations*, even if they could *not enjoy* the legacy. Accordingly, while the contest was pending, and before February 14th, 1891, they formed the purpose of giving away the whole residuary estate to donees, NOT of Mr. Fayerweather's, but of THEIR OWN choice, (V, *fols. 1490-2; 1543-9; 1560-2; 3608-28*).

When this resolution had been reached, Mr. Parsons, who seems to have previously spoken to Mr. Coudert of their intention, wrote to him the following letter (*fols. 1694-9; 1717-22*) :

Told him they were going to give the residue according to their own judgment.

"NEW YORK, February 14th, 1891.

"F. R. COUDERT, Esq.:

"*Dear Mr. Coudert.*—Referring to my talk "a few days since with you, *re* Fayerweather, "permit me to say, the charge having been "made that Messrs. Bulkley, Ritch and "Vaughan propose to retain for their *personal* "purposes Mr. Fayerweather's *residuary* es- "tate, that it is *not so;* and that, to set at rest "any doubts upon the subject, they are ready "now, or at any time, to make such disposition "of it as, in *their* judgment, will best honor "Mr. Fayerweather's memory. If Mrs. Fayer- "weather has wishes in this regard, or, if she "knows of objects she thinks Mr. Fayer- "weather would have favored, they would be "glad to be informed of it.

"Another subject may well be put at rest. "It has been asserted that the provision for "Mrs. Fayerweather is inadequate. What "Mr. Fayerweather's wishes were you know "by his own handwriting. If, however, "$15,000 a year is inadequate, Messrs. Bulkley, "Ritch and Vaughan are satisfied that it would "not be against Mr. Fayerweather's wishes "that it should be increased, and it is their "wish to increase it to *any adequate amount.* "I speak directly for Mr. Bulkley and Mr. "Vaughan. Mr. Ritch, I feel sure, will "concur.

"Yours truly,

"JOHN E. PARSONS."

Mr. Coudert, it seems, made no reply to this letter. *It was not even alluded to* in the subsequent proceedings before the Surrogate, Feby. 18, 1891, above referred to, where he insisted upon the proponents explaining why the *residuary* estate had been given to them *individually*, by instruments *prepared by themselves* and executed by *their* procurement.

Upon the 18th of February the court adjourned to the 25th, with the announcement of the Surrogate's decision that he would admit all these testamentary instruments to probate, unless the contestants could establish undue influence and fraud (V, *fols. 2948–51; 3043–4*).

The time had now arrived for Bulkley, Ritch and Vaughan to give practical effect to their claim that the residuary estate *was absolutely their own*, to do with as they pleased. Their counsel at once prepared, and, on the 24th day of February, 1891, they *executed* the deed of gift *printed at large in the appeal book* (*fols. 3608–28*). This instrument was prepared by Mr. Parsons, with the assistance of Mr. Haley Fiske (a law partner of Mr. Ritch) and Judge Stoddard of New Haven, Conn. (V, *fols. 1760–1; 3626*). It was executed in Mr. Parsons' office (V, *fol. 1770*). *Neither* Mr. COUDERT, nor Mr. ROLLINS, *are shown to have had anything to do with it* (V, *fols. 1760–3*).

This extraordinary instrument begins with the following declaration:

The Deed of "Gift".

"Know all men by these presents that WE, "Justus L. Bulkley, Thomas G. Ritch, and

"Henry B. Vaughan, residuary devisees and "legatees, under the will,—meaning thereby "the original will and the subsequent codicils "of Daniel B. Fayerweather, late of the city "of New York, deceased,—prompted by our "determination that we will not retain for our "own use any part of the residuary estate, left "to *us* by his will, and by the desire to make "such use of his said residuary estate as, in "OUR judgment, will best honor his memory, "*do dispose of* so much of the same as shall "remain, after the payment of all lawful fees, "expenses and charges, as follows (*fols.* "*3008-9*) :—"

It then reserves the power and retains the right, to the *donors*, to consent to any enlargement of the provisions made by the will for Mrs. Fayerweather and Mrs. Mary W. Achter and Mrs. Emma S. Drury (*fol. 3609*). But it does not purport to give them *anything*. It put matters in good shape for *coercing* their *consent*.

It next gives to Mrs. Beardsley the additional $100,000, saying : "We do this because of Mr. Fayerweather's letter" (written by Vaughan) "of November 15, 1890, to Mr. Vaughan and Mr. F. B. Myrick. If accepted, this gift is in discharge of any claim under that letter" (V, *fols. 3610 ; 1932-6 ; 2971*).

Attempt to Conciliate Miss A. A. Joyce.

Then follows a provision containing the $4,000 annuity, to Miss Joyce for her life, *instead of* until her *marriage*; as in the third codicil (V, *fols. 3610 ; 3597*).

After a number of small gifts to individuals aggregating $14,100, besides an annuity of $1,000 per year to one E. M. Upham, for life (V, *fols. 3611–12*), and $100,000 to the Northwestern University of Evanston, Illinois (V, *fol. 3613*), according to the private memorandum of March 22d, 1889, (V, *fol. 1165*), specific gifts are made to eleven hospitals, only five of which had been named in the will and codicils, viz. (V, *fols. 1614–16*):.

Mt. Sinai Hospital, additional.....	$15,000
Presbyterian Hospital, additional.....	25,000
Woman's Hospital, additional.....	200,000
Manhattan Eye and Ear Hospital, additional	25,000
St. Luke's Hospital, additional.....	25,000
Manhattan Dispensary, new.....	25,000
New York Eye and Ear Infirmary, new.	25,000
Montefiore Home for Chronic Invalids, new.....	25,000
Methodist Hospital of Brooklyn, new...	25,000
New York Cancer Hospital, new.....	25,000
Society of St. Vincent de Paul, new....	50,000
Aggregating.....	$465,000

And also to twenty-one colleges, only six of which had been named in the will and codicils, viz. (V, *fols. 3616–19*):

Union College	new	$100,000
Haverford College	"	50,000
University of the City of New York,	new	100,000
University of Pennsylvania	new	50,000
Brown Univerity	new	50,000
Harvard College	"	100,000
Wesleyan University	additional	50,000
Princeton College	new	100,000

Rutgers College	new	100,000
Wells College	"	50,000
Elmira Female College	"	50,000
Vassar College	"	50,000
Barnard School for Women	"	100,000
Cooper Union	"	200,000
Shattuck School	"	25,000
Lafayette College	additional	50,000
Maryville College	"	50,000
Trinity College	new	50,000
Wabash College	additional	$50,000
Marietta College	"	50,000
Yale College	"	150,000
Aggregating		$1,575.000

All the *remainder* of said residuary estate after the foregoing gifts, namely, about $2,000,000, was then divided into *ten* parts. FIVE of these parts were given to the Woman's Hospital, and only *one* each to Yale, Columbia, Harvard and Princeton Colleges and the Presbyterian Hospital (V, *fols. 2621-2*).

After subjecting the foregoing gifts to their powers as executors, to their rights to turn the general estate into money, and to pay taxes therefrom; and to their right to determine any question of identification, or designation of the donees; said instrument proceeds as follows (*fols. 3623-5*):

Their own Doubt as to the Validity of their Deed of "Gift".

"We execute this instrument, *recognizing* "that there *is pending* a contest in proceed- "ings for the probate of Mr. Fayerweather's

" will ; and *recognizing further that*, if such " contest shall *not* prevail, *a question may be* " *made* about our legal *rights* as devisees and " legatees.

" *We assume no responsibility* for the re- " sult of *such* contest, *or of any such ques-* " *tion*, or for the acts or omissions of each " other ; or for the amount of, or title to, any " of said residuary estate. *Our object is*, each " for himself, *to give away* whatever may " come to us as *residuary* devisees and lega- " tees under Mr. Fayerweather's will. This " instrument is to have *only that* effect.

" To make the same as effectual *as we can*, we " deliver the instrument to STEPHEN P. NASH, " Esq., of the City of New York, and Hon. " HENRY STODDARD, of New Haven, Conn., to " hold for the said donees" (V, *fols. 3623-6*).

This "deed of gift" was dated ; and executed by Bulkley, Ritch and Vaughan, individually, in the presence of Mr. Parsons and Mr. Fiske, as subscribing witnesses, February 24th, 1891 ; and was on the same day accepted by Messrs. Nash and Stoddard (V, *fols. 3626*; *1425*).

The selection of the colleges and hospitals, thus designated to be recipients of most of Mr. Fayerweather's estate, *seems to have been left largely to Messrs. Parsons, Fiske and Stoddard. The executors, as such*, according to Judge Arnoux's statement, " *had nothing whatever to do with it* " (V, *fol. 1769*).

Mr. Vaughan and Mr. Bulkley were present a part of the time when it was in preparation, and their communications, whatever they may have been, were made verbally.

Mr. Ritch had many talks with Mr. Fiske concerning the institutions and the amounts to be given to them. His communications were partly verbal and partly on memorandum pads. There was no arrangement between the three as to selecting these institutions (V, *fols. 1762–8*).

The Northwestern University at Evanston, Illinois, was given the $100,000, which had been mentioned in Mr. Fayerweather's memorandum of March 22d, 1889 (V, *fols. 1165, 3613*). *Only* six of the other colleges and five of the hospitals had been mentioned in his will, or codicils, or any of his memoranda. *The remaining fifteen* colleges and six hospitals, which claim under this deed of gift, the bulk of Mr. Fayerweather's residuary estate, were *never* selected BY HIM as objects of his bounty (V, *fols. 1543–9*).

How much Mr. Fayerweather gave to four institutions. How much the Deed of Gift, prepared largely by Parsons, "gave".

MR. FAYERWEATHER gave to the N. Y. Cancer Hospital.....	Nothing
MR. FAYERWEATHER gave to the University of the City of New York....	Nothing
MR. FAYERWEATHER gave to the Cooper Institute.....	Nothing
MR. FAYERWEATHER gave to the Woman's Hospital..... the *smallest* bequest he gave to *any* institution.	$10,000
Total gifts of MR. FAYERWEATHER to these four institutions.....	$10,000

The Deed of Gift, drawn, as just seen, principally by John E. Parsons, in his office; witnessed by him, gave to the *Cancer* Hospital, of which *he* was President.....	$25,000
To *the University of the City of New York*, of which *he* is a *graduate*....	100,000
To *the Cooper Institute*, of which we are informed that *he* was a Trustee, or an Ex-Trustee.....	200,000
To *the Woman's Hospital of the State of New York*, of which *he* was President.....	200,000
Also one-half of the residue after the specific gifts of the Deed of "Gift", namely, about.....	1,000,000
The other half of said residue, in said deed of "gift" went—*not* to *one* institution—but was cut up among *five* in *no one of which*, so far as we know, was said Parsons interested.	
Total gifts of Mr. Fayerweather to these four institutions, *in which Mr. Parsons was interested* $10,000....	
Total "gifts" of the Deed of "Gift", drawn principally by John E. Parsons to these four institutions, about	$1,525,000
Total gifts *by* MR. FAYERWEATHER to them.....	10,000
Total, NOT given by MR. FAYERWEATHER *to them*.....	$1,515,000

The Attorney of Record in the Suit of Amherst, &c., *et al. vs.* Ritch *et al.*, for the Cancer Hospital was John M. Perry;

For the Cooper Institute was John M. Perry.

Said Mr. Perry was, at that time, *a clerk in said Parson's office.*

The Attorneys of Record for the Woman's Hospital of the State of New York, in said action were Messrs. Hoppin & Talbot. Their offices then *adjoined* that of said Parsons (V, *pp. 118-119*).

The Answers of the N. Y. *Cancer* Hospital; of *the Cooper Institute*; and of the *University of the City of New York*, in said action, appear to be VERBATIM *mutatis mutandis* COPIES *of each other* (see V, *pages 208 and 227*).

Whether Ritch ever heard of Mr. Fayerweather's caring to give these Parsons institutions any more than said lone $10,000, Ritch himself tells thus:

(V. 386.) Q. "Did Mr. Fayerweather even mention to you a wish that you should give to Union College any portion of his residuary estate? A. No, sir.

* * * Q. Or *to the University of the City of New York?* A. *No, sir.*

* * * Q. Or to *Cooper Union?* A. *No.*

* * * Q. Did Mr. Fayerweather ever say to you that out of his residuary estate the benefaction to the *Woman's Hospital* should be *increased* over and above the $10,000, which he left to it in the eighth clause of his will? A. *No, sir.*"

As Mr. Parsons does not claim that he ever even *saw* Mr. Fayweather,

To whom DID the latter ever say any such thing?

Objections to Probate of Will Withdrawn.

February 25th, 1891, the day to which the probate proceedings had been adjourned, the counsel for the widow and next-of-kin *withdrew their objections* to the original *will*, and the same was then and there admitted to probate (V, *fols. 2199–2212*).

The Deed of "Gift" Displayed.

The contest, *being thus limited to the question* whether *the codicils* had been obtained by *undue influence* on the part of Ritch and Vaughan, the proponents *displayed* to Messrs. Coudert and Rollins, *their deed of gift*, and had it marked in evidence, and printed in the record (V, *fols. 1374–5; 1702–4; 2254–6*).

This practical and emphatic method *of carrying into effect the claim of* Bulkley, Ritch and Vaughan to be the *absolute* owners of these millions to do with as they pleased, did two things.

It *enforced* their alleged *right*, and *repelled* the charge of a *selfish* motive.

It thereby made the case of the contestants upon *undue influence* almost hopeless.

It was a bold and shrewd move.

Whether its tendency would not be TO INTIMIDATE AND DISHEARTEN THEM, and to *coerce* their acceptance of such "*gifts*" *as* Bulkley, Ritch and Vaughan might offer to them under the powers reserved in this *deed*, may be a question for this Court.

Nevertheless, Messrs. Coudert and Rollins *went*

on with their examination of witnesses. Vaughan, Dr. Vedder and Dr. Wilcox were examined on the 25th day of February, 1891; Ritch, who had been previously examined, was recalled. Mr. Prescott Hall Butler, who drew the codicil of Nov. 11th, 1890, which was afterwards burned, as above stated, was examined on the 26th, but *refused to* testify to its contents, claiming privilege as an attorney. On the 2d day of March, 1891, Vaughan and Ritch were further examined, and also Rev. Dr. Lloyd (V, *fols. 2951-2; 2882*).

Starving the Widow into Withdrawing Her Objections to Probate and into Releasing.

During all this time, since her husband's death Nov. 15, 1890, Mrs. Fayerweather had received *nothing* from his estate (V, *fols. 1458; 2037-41; 2623-4; 2648-51; 2673-9; 2921-32*). "She had "*borrowed* some money in small sums simply to "pay her servants; otherwise *everything she had* "*was charged* to be paid for *at some day*" (V, *fols. 2733*; *2624*). Even her mourning garments were not paid for (V, *fols. 2929-32*). Her legacy of $10,000, which *Mr. Ritch had told her*, Dec. 11, 1890, would be paid the following day, was *withheld* from her nearly four months—until *after* they got her *withdrawal* of her objections to probate, and her consent *to release* (V, *fols. 2681-5*). Her annuity, the payment of which rested in the *discretion* of Ritch, Bulkley and Vaughan (V, *fol. 3571*) was likewise withheld (V, *fols. 2622-4*).

They took the position that she could not have

any money until the will was proved, although, *before probate*, they claimed *and exercised the right*, as we have seen, *to give away the whole residuary estate*, as devisees and legatees thereof under the codicils. Even after the probate of the will, and qualification of the executors, Feb. 25, 1891, which entitled her to the *immediate* payment of her $10,000 legacy (*fol. 3569*), and to the first quarterly payment of her $15,000 annuity then past due (*fols. 3570-1*), *they still withheld* ALL *money from her.* This condition of affairs worried her and aggravated her disease (V, *fols 2378-80*). *They knew* it *would* do so. Mr. Ritch's talk to her, Dec. 11, 1890, *shows that* (V, *fols. 2681-5*). They knew *her dependence upon them.* And they appear to have calculated, with certainty, as the event shows, *to coerce* this sick and nervous lady to their wishes.

Vaughan's Fist in a Lady's Face.

But Vaughan was not content with slow torture. After he saw that the deed of gift had failed to end the contest, and he, himself, was being subjected to examination, he resolved upon more drastic measures. Mrs. Fayerweather did not attend the Surrogate's Court (V, *fol. 2381*). But her sister, Miss A. A. Joyce, was frequently there (V, *fol. 2826*).

Vaughan knew that he could reach Mrs. Fayerweather through Miss Joyce. Upon the adjournment of the Surrogate's court, either on the 26th day of February, or the second day of March, 1891,—the date is not positively fixed—Vaughan approached Miss Joyce, who was conversing with Dr. Irwin in the court room, after most of the people had left, and, shaking his *fist* in her face, said :

"*Miss Joyce, I will fight this thing as long*
"*as there is a dollar left of the Fayerweather*
"*money*, and as long as I have a dollar of my
"own private fortune ; *and I want you to tell*
"*Mrs. Fayerweather this ; and I mean every*
"*word I say*" (*fols. 2737-43 ; 2873-6 ; 2881-*
"*93 ; 2334-43 ; 2371-6 : 2386*).

Vaughan *was very much excited*, and his manner was exceedingly THREATENING, (*fols. 2339 ; 2343*), Miss Joyce was very pale, *and very much frightened* (*fols. 2371-7*). Her only reply was "Thanks, Mr. Vaughan" (V, *fol. 2741*).

She went home and *told* Mrs. Fayerweather exactly what Vaughan had said ; and his *manner* (V, *fols. 2743-6 ; 2879-81*). Mrs. Fayerweather *was very much agitated* and excited. *She said :*

"That we probably had better SETTLE this
"thing ; that Mr. Vaughan HAD IT IN HIS
"POWER TO, as long as he chose.
"And the best thing we could do was TO
"SETTLE the thing" (V, *fols. 2744-54 ; 2879-*
"*80*). She was thereupon taken *very ill.*

Miss A. A. JOYCE testifies :—"The *result*
"was, she was quite ill for several days. The
"woman *was made ill by it*,—in consequence
"of it. She was *very sick* for some time after-
"ward. She was in bed for several days after
"that, and the doctor was there once or twice
"a day—*twice* a day *most of* the time" (V, *fols.*
"*2749-54*). "I had a severe reprimand from
"Dr. Irwin for telling it to her. If I had
"taken time to think of it I would *not* have
"told her" (V, *fol. 2880*).

Dr. IRWIN testifies:

"All the symptoms of her disease were "aggravated; she was producing a very much "larger portion of sugar than previous to the "annoyance connected with the trial, and she "did not sleep as well. She was restless and "*weak, and worried a great deal, too.* Her "general condition was *exceedingly* unfavor-"able, at that period. She was very nervous "and excitable. This aggravated condition "continued for some time. I remember that, "after the settlement had been arrived at, her "condition improved very rapidly, but, until "that time, her condition was very unfavor-"able. The *settlement* was a *good* thing for "her" (V, *fols. 2344–50*).

The counsel for Bulkley, Ritch and Vaughan, in answer to an enquiry of the court on this trial, declared that they were *not* going to contest Dr. Irwin's statement of Mrs. Fayerweather's condition (V, *fol. 2732*). Vaughan did not attempt to contradict, explain, or excuse his conduct.

How They Obtained the Widow's Agreement to Release.

While Mrs. Fayerweather was thus enfeebled and helpless, Bulkley, Ritch and Vaughan, and their counsel, took prompt advantage of it. Fiske prepared two papers for execution. One to be signed by said three men; the other by the widow and next-of-kin (V, *fols. 1723–1774*):

Each was dated March 5th, 1891, and was executed upon that day.

The *only* person who seems to have represented

the three next-of-kin in this settlement was Beardsley. But the powers of attorney to him, bear date eight days later, namely, March 13th, 1891.

As this settlement agreement was made March 5th, 1891,—so far as the record shows,—*he appears to have had no authority to* make *it.*

The record is silent as to anyone looking after, or representing *the widow's* interest in this settlement.

She appears to have signed it herself.

No proof appears that her counsel, Mr. Coudert, or anyone else *advised* her; *or protected her interests in any way;* unless it was Beardsley himself.

There is no *witness* to her signature.

There is no *acknowledgment* of it.

The paper was drawn in *Ritch's* office, as appears from his clerk, Fiske's testimony (V, *fol. 1723*), thus:

"Q. Did *you* have to do with the prepara-
" tion of that? A. Yes, sir."

This was *after* Vaughan's long walk and talk with Beardsley, on the afternoon of the day Mr. Fayerweather died.

It was *after* Beardsley wrote Vaughan:

"November 25th, 1890.

"I *am engaged in the effort to persuade her*
" that she is not left poor; *but has been left*
" *sufficient to live as Uncle did.*"

It was *after* Ritch wrote Beardsley:

"November 28th, 1890.

"I hope that they will not act under bad ad-
" vice, and cause delay by objections, *which*
" *could have no other result than* delay."

It was *after* Ritch wrote Beardsley:

"Dec. 14th, 1890.

That "*In kindness to Mrs. Fayerweather* and Miss Joyce, *they ought*, in some way to be informed of the existence *in my possession* of a '*prior*' will; *much less* favorable to both of them *than the present;* and with *no* '*discretion*' whatever to the executors",—

which, however, instead of being "much *less* favorable", to the widow as already seen, would have given her nearly $1,400,000 *more* of principal and commissions; and three thousand dollars *more* annuity, than the will in which *Ritch* was executor, and would receive about $60,000; and the widow *none;*

while under this "prior" will, *she* would receive said $60,000; and Ritch *none.*

It was *after* Beardsley had had delivered to him the $125,155, to keep the widow *fully informed of everything* she wished to know; and to *protect* her interests in every way.

It was *after* he had to choose between $50,000 for his family under this prior will;

and $200,000 for them under the 1884 will, and this alleged letter, while Mr. Fayerweather was dying.

And he chose the latter.

She thus seems, not only to have been *entirely alone in* this transaction,—*without* guide, friend or counsel, or *any* knowledge that she *had* any rights! Except Beardsley.

But no suspicion *of Beardsley* had then dawned upon her.

He was her nephew by marriage.

He had the entrée to their home.

He was an ex-Judge of Probate, which would naturally lead the testator and his wife to regard him as *just the man* upon whom she could *rely* implicitly, for everything she wanted to know, about the estate; and to protect her interest in it, after her husband had gone.

Whether, instead of trying to satisfy her as he wrote, that she already had enough; it was his duty to have been closely scrutinizing every fact, and act, that would tend to shed light upon her rights; and that would aid him in protecting her interests, to the best of his ability, under these circumstances; and under this princely retainer;—is for this Court to say.

Also whether he was loyal to his trust,—or *betrayed* it.

Who *took* that agreement to release, to the widow to sign? The proof does not show.

It *does* show that Beardsley was in such haste to sign it for the three next-of-kin, that he signed it—so far as the record discloses—*without* authority.

That, instead of *striving* to obtain *full* knowledge of the widow's rights and interest in the estate; and those of the three next-of-kin for whom he was claiming to act, even to the extent of looking at this terrible "*prior*" will;

when a mere *look* would have shown that it was over a million dollars BETTER for the widow than the one Ritch wanted ;

And nearly a half a million BETTER *for each of the three next-of-kin*, for whom he claimed to be attorney in fact ;

That instead of trying to get the widow a reasonable part of her husband's estate—in the place of one-fiftieth of it, as by the 1884 will, drawn by Ritch ;

and the income of but one twentieth part of it ;

that he was busy urging the widow to believe that she was *as well off*, as she was in her husband's lifetime.

That he was in communication with Vaughan and Ritch ;

That he was taking—*so far as he knew—great* care of his *wife's* interest—whatever he was doing *of the widow's.*

When Vaughan so thoughtlessly and suddenly disclosed, when he was being asked *about another matter entirely*, namely, as to whether he ever *told* counsel of the other two nieces, that they had any *rights* under the will, *beyond* those specified in it ; when he told—which nobody *asked* him—*that he had informed Beardsley of* this second $100,000 ;

but, though it must have been within less than three months, *he could not remember when* he told him ;

and when he was being pressed closely to tell ;

and Arnoux, seeing the danger, shut off inquiry with an objection ; when he came near telling *too much ;*

Whether it does not look as if he, Vaughan, felt the importance of letting Beardsley know that that

$100,000 would go to his *wife only if as Vaughan cared to have it;*

but, if not, that he, Vaughan, could make it very difficult for him to get it;

May be for this Court to say.

As the widow *had not enough money to even buy her food and to pay her servants;* as she had been carefully informed by these three men that they had just *deeded away* the *entire* residue of the estate, and she naturally believed that a deed was a *deed;* and that, therefore, that there *could be* no more for her;

would it take much urging from one who she had *every* right to believe was her friend, and worthy of confidence, whom her husband had selected as such, and had paid enormously in advance to prove himself such;

to induce her to accept $200,000, when *she did not know* that there was *one dollar even* left;

but believed that it had *all* been deeded away;

and had she not a *right to believe it?*

Could the situation, under *such* pressure, have been much *more* difficult to resist?

When scarcely a week after her trusted nephew had signed for all three nieces, her name is found affixed to the same document;

without witnesses, or acknowledgment;

and *no* explanation how it got there.

In this situation, unless Ritch, Bulkley or Vaughan satisfy Your Honors to the contrary,—

does it not look as if the probable one, who brought this agreement to this enfeebled invalid in her last illness, and prevailed upon her to sign it,

at the same day he did for all of the next-of-kin, was no other than this same Beardsley, who, as has been seen, was so profoundly interested to have it go through, that he had not even waited for the powers of attorney before he signed?

Upon which side would you say that he was working? That of Ritch and Vaughan?

Or in behalf of the widow? Of men who were plying him with reasons why he should sign *at once*, and get more for *his* wife, AND FOR THEM, whatever became of the widow?

Or determined, at all hazards, to honestly protect, to the best of his ability, the interests of his dead friend, in the one, whom, in every document he left her, he describes always as "my beloved wife"? (See will of 1880) (IV, 213); (see will of 1884) (IV, 183); (see will of 1878) (IV, 302).

And if Vaughan will deign to allow Your Honors to inspect the "BURNED" codicil of Nov. 11th, 1890—but four days before Mr. Fayerweather died—you will be exceedingly apt to find the same words.

Had he beforehand told Mr. Fayerweather *that he was going to* do *just what* he *has* done towards Mrs. Fayerweather—*How much of that $125,155 would he have ever received?*

Is it not exceedingly likely that, instead of ever getting *one dollar* of it, *he too*, like another trusted "*friend*", Vaughan, would have been promptly *ordered* "*out of the room, and out of the house*"?

Beardsley Blind Even to His Own Interests.

Ritch had told him that this "prior" will gave "Trust estates for life, to the daughters of William Fayerweather; EXCEPT $25,000 TO MRS. BEARDSLEY."

His own wife was a daughter of said William Fayerweather.

She had, as Ritch said, a *trust* estate of $25,000.

Also, said *other* $25,000 *outright.*

Had Beardsley gone resolutely about his duty to the widow, and cared for her interests, as Mr. Fayerweather stated he was paid to do ( );
he would have not only really taken care of those interests.
But why would he not have done *more*?

Would it not have been a simple matter, that would occur to almost anyone, when a "prior" will was held over his head, to keep off a contest of a later will,
to ask to *see* that "prior will"?

If, instead of so readily accepting Ritch's version of its contents; *he had read it himself*;
he would have found,—if he, a Connecticut lawyer, an ex-Probate Judge,—knew of Chap. 360, of the N. Y. Stats. of 1860;—and, if not, a glance at the N. Y. Revised Statutes would have shown it to him;
He would have found, that the will, *on its face*, partly by specific bequests to colleges, and partly

by dividing the residue among them, share and share alike; gave almost the *entire* estate to institutions, to which said statute *prohibited* such gifts, of over one-half of the net estate, left by one whose wife survived him.

Hence that, as to said *second* half of the estate, this "*prior*" *will* was not only *void*;

And, as to it, Mr. Fayerweather had died *intestate*, as to the widow;

BUT ALSO TO THE NEXT-OF-KIN.

And hence AS TO HIS OWN WIFE!

So that, instead of choosing the $100,000 bequeathed to her by the will of 1884;

and the second $100,000, which he could not get, unless the 1884 will, and its dying-day codicil were probated;

Because, if the "prior" or 1880 will were established, grave doubt would exist if said second $100,000 would *ever* come into the hands of Myrick and Vaughan;

and *so*, get to Beardsley.

Doubt which would be accentuated by the proof, which has been developed in the present suit, as to whether the testator *was capable of making* any *such* order, while dying, for said *second* $100,000:—

If, instead of accepting the 1884 will so promptly, he had probed into the ominous "prior" will;

he would have found that *his wife's share thereunder*, instead of being said $200,000; *would have been more than twice that*;—or about $500,000!

He Chose the Bird in the Hand.

He chose the bird in the hand,—without even *looking at* the other one.

He probably never dreamed that his work at that time, and his manner of executing his trust to his great benefactor's widow would one day be subjected to the scrutiny of the greatest tribunal upon the face of the earth.

Is not the loss of $300,000, and of the respect of all men who ever learn of his conduct,—a *high* price to pay for *any* bird in the hand?

How Came Ritch to Have That Prior Will?

And, by the way, how came *Ritch* to *have* that "*prior*" will? What was *he* doing with it?

When he drew the later, or 1884 will, and its first clause, which says, "I hereby revoke all wills and papers testamentary by me at any time heretofore made."

Did Mr. Fayerweather know that Ritch was *keeping* this "prior" will, ready to spring it upon Beardsley, if he attempted to contest the 1884 will?

Had he *told* Mr. Fayerweather that he *was going to do* just what he *did* do;

That, instead of this "prior" will being *revoked, he was going to keep it alive* and *to use it as a weapon* to make sure of his $60,000—of commissions, under the 1884 will—instead of *nothing* under the prior will;

and of his nearly $1,800,000 until Vaughan interrupted him; and then of his nearly $1,200,000, which he swore he owned *absolutely;*

and of about $1,000,000 more for him until

Vaughan came ; and then of $700,000, also his absolutely, if HE deemed it "*expedient*" to "*withhold*" it from the 20 colleges ;

Would Mr. Fayerweather have then waited as long as until four days before he died, *to dismiss* Ritch from his service ; and *to refuse to ever* see him again ? (II, 558).

Had Beardsley been doing *his duty* by the testator, who had paid him so munificently to make sure that he took good care of the testator's wife, in her feeble declining life ;

Why did not he—an ex-Probate Judge—a specialist in the estates of decedents, and no doubt so thought by the testator,—a plain man of leather;

why did he not *ask* Vaughan, just how he COULD, as he threatened, *spend every dollar of* the Fayerweather estate, to *keep the widow from* receiving *anything* from it, BEFORE the last codicil was admitted, which gave THE ONLY title, which Vaughan *could* have, *to even one dollar of* said estate, except his commissions as executor and trustee?

Before he let the widow and next-of-kin WITHDRAW their objections to the probate of the codicils ;

so giving Vaughan *the very power he was after?*

Why did not Beardsley *ask* these three fiduciaries, *how they came* TO NEED the consents of these ladies to withdraw their objections to the probate, *if, all the time, what these three men said,*—WAS TRUE?

Namely, that THEY owned the residue ABSOLUTELY ;

Hence that these ladies owned *no dollar of it*!

Why waste $310,000, which *they* three owned *absolutely*, upon three ladies *who owned* NOTHING?

Why did he not also ask,
How came you to make a "Deed of "*gift*" of millions, *before* the codicil was admitted to probate, *upon which admission alone depended your title to every cent of those millions*?
Why *such haste*?

It might smother public inquiry, as to how they came to get these millions for nothing.
Part of the public might be blinded by these three men suddenly posing as great benefactors of money, which that public, up till then, wondered how they honestly got;
Or honestly *held*.

But how came a man, worthy of the name of a Probate Judge, instead of showing the holes in such a questionable transaction; and forcing these three *fiduciaries*, TO PROVE their title to this large estate;
How came he, instead, to be trying to satisfy the widow that she was quite as well off as she was when the testator was alive?

How came he to be *telling Vaughan* what he was doing?

What was the *need* of his writing TO RITCH?
What did *he* care for *Ritch*?
Or for *his* opinion?

When Ritch felt it necessary to write him of "the hopelessness and unwisdom of" a contest by the widow with her dear "friends" Ritch and Vaughan?

Where is the proof that he asked or said *one word explaining* that "hopelessness", except the threat of the "prior" will, so thoughtfully specifying only $25,000 for Beardsley's own wife?

What was Ritch *to him?*

Had he looked searchingly into the situation; had he made some endeavor to *earn* probably, by all odds the greatest retainer he ever received in his life, *already paid him* in advance;

he would have found that, not only under the "prior" will with its residuary bequest VOID UPON THE FACE OF THE WILL, the widow would, as already seen, have been over a million dollars *better off than* under the 1884 will;

But, if the testator gave his wife $15,000 a year; or rather, as much of it as Ritch's "discretion" would allow, when he made his 1884 will;

and when he did not *have* over $2,500,000;

Was it too much to ask of a faithful lawyer, that he *should find out the amount of* the estate at the time testator *died?*

And when he learned that it was, as two of these fiduciaries had sworn, "Upwards of $6,000,000";

Would it require a lawyer of very high calibre to ask how the testator did not give his beloved wife an annuity, *in the same proportion* to his entire estate, that he *did* when he made the 1884 will—when he had but *five-twelfths of* $6,000,000?

Why her annuity, instead of being $15,000, did not become $36,000?

Had he made a little inquiry; had he asked the

widow's sister, Miss A. A. Joyce, what the list of names and sums opposite, *in Vaughan's own handwriting, taken down at Mr. Fayerweather's dictation but five days before he died*, what *this* important paper *said* upon *this* subject;

She would have told him of the amount *she saw* set opposite the widow's name *upon the very paper*, which the testator said was the "*correct*" paper.

Where is the line of proof, in this entire record, that Beardsley ever *turned his hand over to find out* what the widow's heritage was; and then to secure it for her?

How came he,—oblivious of these important questions, right in the line of his duty, as a man just given a fortune for himself and family;

How came he to be thus corresponding with two of these three *fiduciaries*, one of whom *had gone out of his way to* make sure that he told him that his wife would get *a hundred thousand dollars more* than the will gave her;

How came he to feel so called upon to convince *these* men, that it *would be better for the widow* to be content with what she could get in *their* "discretion";

and *not* to *oppose their* plans, and jeopardize the probate which might *unseat* them as executors?

And so endanger their very commissions themselves,

to say nothing of their huge residuary legacies?

How came *he* to so dread the terrible "prior" will, that he somehow, promptly made sure of the $100,000, of specific bequest, to his wife in the 1884 will;

and also of the other $100,000, NOT in the will or any codicil,

But about which Vaughan *volunteered to* swear that he had taken care to tell him ;

And which, if he did *not* get and stay on good terms with Ritch and Vaughan ;

His wife *would probably never see a cent of ?*

A Tell-Tale Word.

Once in the life of this nation a statesman of great experience, high ability, and of rare personal charm, just escaped being chosen our Chief Executive.

But three words did much to thus disappoint—once and forever—his greatest ambition.

They were,

"BURN THIS LETTER !"

Why ? Asked a Nation.

In a questionable transaction, he had thus *confessed* that there was something which he wanted TO HIDE.

THAT was NOT the kind of an agent the Nation cared to place in one of its highest positions of trust.

He found those three simple words remembered —*fatally* remembered—when all else that he had said, in his whole life, was forgotten.

And remembered to his undoing.

When Beardsley saw that this letter to him from Ritch was marked

"PRIVATE",

What *more* did he need to put him *on guard?*

To want to know *why* Ritch was thus writing him "*private*" letters, as to his duty to her, whom he had been so magnificently paid to protect ?

Is more required to bring out, *upon which side* this man—probably the widow's closest and most trusted adviser, the husband of the only near relative of her late husband, who lived in the East—stood, in his struggle to serve Two masters,

The testator;——

And himself?

Had he done all that a loyal and careful attorney *should have done*, first to *earn*, and then to *protect*, *the* widow's interests;

Had he EARNED this splendid retainer, which he had already HAD;

Had he *closed his ears to* Ritch's enticing words of the "*prior*" will, nominally with but $25,000, to Mrs. Beardsley;

—Your Honors can judge *if Ritch knew* it gave her far *more* than that—or not;—

Would he have had *any* difficulty in finding out that these three men *were in some doubt about* whether they did own this residue *absolutely* or not?

In finding that they were *not* giving away $310,000 FOR NOTHING?

Before they even had *any* title to it?

That, at every turn, the scheme disclosed steadily increasing *grounds for suspicion;*

About which *no* satisfactory explanation came;

Or has *yet* come?

That withdrawing her objections *before* the contest was *half* over, was the very *last* thing a loyal attorney, under *such* circumstances, *would have permitted her* to consider *for a moment?*

Only Five in the Way.

But *five* persons stood in the way of the complete

success of this scheme to own this residue absolutely :

The widow ;

The three next-of-kin ;

And the widow's sister who lived with her—Miss A. A. Joyce.

If Ritch and Vaughan could quiet *them*,—their plan would win.

Ritch's "*discretion*",—so thoughtfully put by him in the will ;

Was an ever-present help.

But it was not quite *enough*.

It was not a release-getter yet.

Vaughan's threat to devour the entire estate in litigation—for devouring widows' houses, has not yet ceased to be an industry, *though* known in Bible-days,—

and next by the "gifts" to others of the whole by the three,

were powerful factors in reducing this aged and feeble invalid to submission ;—

They showed her, indeed, as Ritch had so well put it—"*the hopelessness and unwisdom of*" the contest.

But when Beardsley, upon whom she had *a right* to count—who had been paid *to protect* her, and who does not deny it,—was so eager to release, that he agreed to it for all three of the next-of-kin, so far as this record shows, *before* he had any authority to do so ;

When the trusted Beardsley himself was so intent upon *stopping* the contest,——

just where *could* she turn ?

They had her at bay.

For all the three next-of-kin, Beardsley *had already* signed the agreement withdrawing the contest.

Only Miss A. A. Joyce remained.

Ritch's strange—defectively explained -- work, in getting into the will the clause that her annuity would *cease*, if she *married ;*

these three fiduciaries thoughtfully *cut out of* their deed of "*gift*"——

Strong inducement to *her* also, to see the "*hopelessness and unwisdom of any further contest.*'

In SUCH a situation,——

Was it a strange thing that the widow *withdrew* her objections to the probate ?

And that she *released ?*

With her husband's three "friends",——

chosen by him from his *entire* acquaintance, as the men whom he could *best* trust ;

Thus *engaged in keeping her from obtaining* her share of her husband's estate ; dining at her home on the very day her husband died ;

With the trusted Beardsley, already having the consents of all the next-of-kin ;

with his entire interest and effort being obviously spent in the *same* direction ;

Where was she to turn ?

What was she to do ?

In such a situation,

Would it not have been a strange thing if she had NOT *withdrawn* her objections ?

And have *released ?*

There is no evidence that either Mr. Coudert or Mr. Rollins, were consulted about the preparation, or execution, of these instruments, or that they approved of them, or advised their clients concerning them, or even knew of them, until after they were executed. All that then appears is that, on March 13, 1891, they, or someone in their offices, signed consents to the entry of orders in the Surrogate's Court, *withdrawing their objections* to the codicils, and that the proponents' attorneys entered orders thereon (V, *fols. 1374–93*).

Said instrument, so executed by Bulkley, Ritch and Vaughan, and accepted on the same day, by said Nash and Stoddard, read as follows (V, *fols. 1417–25*):

The Deed of "Gift" to the Widow and to the Next-of-Kin.

"Whereas, WE, the undersigned, Justus L. "Bulkley, Thomas G. Ritch and Henry B. "Vaughan, residuary devisees and legatees "under the will, meaning thereby the original "will and the subsequent codicils of Daniel B. "Fayerweather, late of the City of New York, "deceased, did, under our hands and seals, on "the 24th day of February, 1891, execute a "deed of gift disposing of the residuary estate "left to us by the said will, and in and by said "deed reserved the power to make and retain "the right to assent to any enlargement of the "$15,000 given by the will to Mrs. Fayer- "weather, which she might desire, and also "reserved the power to make and retain the "right to assent to any enlargement of the

" provision made by the will for Mrs. Mary " W. Achter and Mrs. Emma S. Drury, in " case we should be satisfied that such enlarge- " ment *would not be against* the wishes of Mr. " Fayerweather ; and

" Whereas, *a desire has been expressed to us* " by Mrs. Fayerweather *for the enlargement* " hereinafter made of the amount left to her " by the will, as aforesaid ; and

" Whereas, *we* have become *satisfied* that it " *would be* (does not state *how* they found out) " the wish of Mr. Fayerweather to make the " enlargement hereinafter provided, of the " provision by the said will for Mrs. Achter " and Mrs. Drury, aforesaid,

" Now, Know all men by these presents, that " under the power, authority and rights re- " served and retained by the deed of gift " aforesaid,

" First.—We hereby give----

" 1. To the wife of said Daniel B. Fayer- " weather, deceased, the capital sum of Two " hundred and twenty-five thousand dollars, " bearing interest from April 4, 1891, upon any " part thereof then unpaid, to be at her abso- " lute disposal, and also to increase her annu- " ity of $15,000 a year, so long as she shall " live, to the sum of $25,000, for the period of " her life, and *we also agree to execute to her* " *a deed of the lot in Woodlawn Cemetery, in-* " *tended for the remains of Mr. Fayer-* " *weather.*

" 2. To Mrs. Mary W. Achter the sum of " $42,500, and Mrs. Emma S. Drury the sum of " 42,500, bearing interest from April 4, 1891, " upon any part thereof then unpaid.

"SECOND.—And inasmuch as the reserva-
"tion and retaining of the powers and the
"rights to make the foregoing gifts were in
"the said deed of gift, executed on the 24th
"day of February, 1891, hereinbefore men-
"tioned, made the first and second paragraphs
"thereof, we hereby declare that the pay-
"ments hereinbefore provided for shall have
"precedence over the gifts mentioned in the
"third, fourth, fifth, sixth, seventh, eighth and
"ninth paragraphs of said deed of gift.

"THIRD.—The foregoing gifts are made sub-
"ject to the provisions of the tenth paragraph
"of the deed of gift executed on the 24th day
"of February, 1891, hereinbefore mentioned.

"In witness whereof, we have hereunto set
"our hands and seals, and delivered this instru-
"ment to Henry Stoddard and Stephen P.
"Nash, mentioned in the deed of gift afore-
"said, this 5th day of March, 1891. Executed
"in triplicate.

JUSTUS L. BULKLEY, [SEAL.]
THOMAS G. RITCH, [SEAL.]
H. B. VAUGHAN. [SEAL.]

"We accept the foregoing instrument under
"the provisions of the first and second para-
"graphs of the deed of gift therein mentioned,
"heretofore accepted by us.

"Dated New York, March 5th, 1891.

"HENRY STODDARD,
"S. P. NASH."

Did She Know Its Contents?

She was not asked if she knew its contents; if she executed it FREELY and WITHOUT fear or compulsion.

Said instrument, so executed *by the said widow*, and by Beardsley for the next-of-kin as aforesaid, *not* witnessed, *or acknowledged*, reads as follows (*Exhibit 8, fols. 1410-16*):

> "In consideration of the instrument of even "date herewith executed by Justus L Bulk- "ley, Thomas G. Ritch and Henry B. Vaughan, "residuary devisees and legatees under the "will, meaning thereby the original will and "the subsequent codicils of Daniel B. Fayer- "weather, late of the City of New York, de- "ceased, and of its delivery to Henry Stoddard "and Stephen P. Nash, we the undersigned, "being the widow and all of the next-of-kin of "the said Daniel B. Fayerweather, do hereby "severally agree for ourselves, our and each of "our heirs, executors and administrators, as "follows:
>
> "1. All objections to the probate of the will "and four codicils of the late Daniel B. Fayer- "weather, offered for probate to the Surrogate "of the County of New York, are hereby with- "drawn, and we consent to the probate of the "same.
>
> "2. No suit shall hereafter be brought for "the construction of the said will and codicils "by either of them, or to set aside the will and "codicils, or either of them, and we further "agree not to make any claim upon the said "Justus L. Bulkley, Thomas G. Ritch and

"Henry B. Vaughan, or either of them, or "against their heirs, or personal representa- "tives, or either against them, the said Bulk- "ley, Ritch and Vaughan, as executors, or as "residuary legatees, other than for the "amounts left to us by the will and codicils "aforesaid, and the deed of gift executed by "the said Bulkley, Ritch and Vaughan on the "24th day of February, 1891, and the instru- "ment dated on the 5th day of March, 1891.

"3. Upon the payment to the undersigned "respectively of the several amounts men- "tioned in said deed of gift, and said instru- "ment, we will severally execute a general re "lease of all claims except those arising under "the will and codicils, *both to the executors "and to the donees mentioned in the deed of "gift*, dated on the 24th day of February, "1891, and to the said Bulkley, Ritch and "Vaughan individually.

"IN WITNESS WHEREOF, we have hereunto "set our hands and seals this 5th day of "March, 1891. Executed in triplicate.

"LUCY FAYERWEATHER. [SEAL.]
"LUCY J. BEARDSLEY,
"by Morris B. Beardsley,
"her Attorney in Fact. [SEAL.]
"MARY W. ACHTER,
"by Morris B. Beardsley,
"her Attorney in Fact. [SEAL.]
"EMMA S. DRURY,
"by Morris B. Beardsley,
"her Attorney in Fact. [SEAL.]"

We call particular attention to the *phraseology*

of the two foregoing instruments. There is *nothing* to show *any* knowledge on the part of the widow or next-of-kin *that they had any interest in* the residuary estate; *or any intent* on their part *to sell or convey* any *such* interest; or any intent on the part of Bulkley, Ritch, or Vaughan to *purchase from them* any *interest* therein. The transactions take the form of *gifts* from the latter to the former, under the powers reserved in the previous deed of "gift". The *right* of the widow, or next-of-kin, to any part of the residuary estate is *not* asserted *or admitted.*

There is No Recital of any Rights or Interest.

There is NO RECITAL of their rights. On the contrary, the act purports to be one of BOUNTY, on the part of the donors, because "a desire has been ex-"pressed by Mrs. Fayerweather for the enlarge-"ment of the amount left to her by the will," and because the donors *had* "*become satisfied that it* "*would be the wish of Mr. Fayerweather* to make "the enlargement hereinafter provided of the pro-"visions of the said will for Mrs. Achter and Mrs. "Drury" (Vol. V, *fo's. 1419–22*).

(VI, .) Vaughan swore that the testator told him on the morning of the day he died, and just before Vaughan had the last codicil executed as to the residue, that other *institutions* would have to be found, and the residue would have to be given to *them.*

Just where he,—Ritch,—and Bulkley got any *right* to give $300,000 of it *not* to *institutions* at all; but to the *widow* and *next-of-kin*, does *not* appear in the record.

As Mr. Fayerweather had been *dead* more than three months when they made this statement, *how* did they *become* thus "*satisfied*" that it would be *his wish* to increase the bequests to Mrs. Achter and "her sister, Miss Drury" (now Mrs. Emma S. Fayerweather), as they *did* increase them in their deed of gift?

Just after insisting that they had no right to any of it; and that they would spend every dollar of it before the widow should have ANY of it.

(VI, p. 715.) Vaughan swore that he strove with the testator on the day he died, to get him to increase the legacies of these very two next-of-kin above the $20,000 named in the third codicil.

But that he *refused* to do so.

When asked (V, p. 501) if the burned, or fourth codicil did not enlarge the legacies of these two ladies, he swore, although it was scarcely three months since he had had that codicil drawn, by his own lawyer, and executed, "Not that I remember."

A Draft for this "Burned" Codicil, Made by Vaughan—at Mr. Fayerweather's Dictation, Nov. 10th, 1890.

"(II, 552.) Mrs. A. A. Joyce Reynolds testi-
"fied thus, as to the draft in Vaughan's hand-
"writing on very long, legal paper, made by
"him in his talk with the testator, November
"10th, 1890, in preparing for the burned codi-
"cil, which Mr. Fayerweather said was *cor-*
"*rect*, that said paper, 'Was names and
"figures'".

"63 Q. Do you remember any of the names?

"A. Mrs. Fayerweather's name appeared first.
"64 Q. Well, any others? A. My name.
"Q. Any others? A. *Three nieces.*"

Is not *this* draft for the "burned" codicil the source from which they so became "satisfied" that it would be the wish of Mr. Fayerweather to make the enlargement hereinafter provided, of the provisions of the said will, tor Mrs. Achter and Mrs. Drury "(The latter being Miss Emma S. Fayerweather)"?

Or was it from Vaughan's own statement, where he swore, as follows:

"(VI, 715, Vaughan.) A. I suggested to Mr. "Fayerweather that he should increase the "provision for Mrs. Achter and Mrs. Drury "from $20,000 to $50,000.

"Q. When? A. That was the time that he "told me that he had given an additional hun-"dred thousand to Mrs. Beardsley, who was "their sister.

"Q. Still you do not tell *when* it was? Was "it on Saturday morning? A. Yes, sir.

"Q. At *this long conversation* of that morn-"ing? A. Yes, sir, early in the conversation. "* * * he had talked over the matter with "Jennie,—Mrs. Beardsley; and she said it "was enough.

"Q. Did he give you any instructions, or was "anything said about changing that provision? "A. No. HE TOLD ME THAT WAS SETTLED. "WAVED HIS HAND TO CLOSE THE DISCUS-"SION."

Was it *these* words of Mr. Fayerweather which

"*satisfied*" them that it *would be* the wish of Mr. Fayerweather to make that exact increase of $30,000, which they *did* make in their deed of gift"?

The Consent of the Twenty Colleges.

At the same time that the above papers were executed, Fiske set about obtaining the consent of donees under the deed of gift to the payment of said sums, which aggregated $310,000, to the widow and two nieces. Also to the payment of all the expenses of the litigation in the Surrogate's Court, and payments to be made by the executors out of the estate. For this purpose he sent out a circular, *dated March 4, 1891, the day before the agreement was signed* (V, *fols. 1756-9; 3028-40*). He got these consents in about two weeks (V, *fols. 1705-17*).

The Four Unburned Codicils Admitted.

March 24th, 1891, on motion of Mr. Arnoux, no one appearing to oppose, the Surrogate entered a decree, admitting all four *codicils* to probate, and allowing costs to all the attorneys, *except* Coudert Bros. *and* Mr. Rollins, *who do not seem to have taken any part in such proceedings* (V, *fols. 2213-35*).

About 4 months after the Testator's Death, and AFTER obtaining the Widow's Withdrawal of Objections to Probate, and Her Agreement to Release, then they began paying Her Bills.

After obtaining Mrs. Fayerweather's signature to said paper, Exhibit 8, dated March 5, 1891, and without waiting for the formal withdrawal of her objections, or the further decree *probating* the *codicils*, the executors *hastened to* make the payments, which they had been *withholding* from her. *On the 9th day of March, 1891*, they paid to her the legacy of $10,000, and the first quarterly installment of the original $15,000 annuity, viz.: $3,750; and the first quarterly installment of the $10,000 *increase of* annuity under said instrument, of March 5, 1891, viz.: $2,500 (V, *fols. 2617-23; 1393-4*). They took her receipts in duplicate for the same (V, *fols. 2648-9*). The receipt for the $2,500 increase of annuity read: "*In settlement of annuity for quarter ending 15th inst. under agreement and deed of gift* (V, *fol. 2649*). At about the *same* time, they went to paying her doctor's, milliner's and trademen's bills, and household expenses, part of which had accrued before, and part after, her husband's death (V, *fols. 3648-51; 2673-9; 2921-32*).

When Bulkley, Ritch and Vaughan sent out their circulars to the donees under the deed of gift to obtain their consent to the payment of said $310,000 to the widow and two nieces, as above stated, they also had Fiske endeavor to obtain written consents thereto from the legatees under the will

and codicils. These consents were signed by all the legatees, except the University of Rochester, prior to June 12th, 1891 (V, *fols. 1425-42; 1468; 1723-40; Exhibit 10, fols. 1429-33*).

On the 12th day of June, 1891, the executors paid to Mrs. Fayerweather, from the estate of said testator, the said "*gift*" of $225,000, which Bulkley, Ritch and Vaughan had presented to her, as aforesaid, together with interest thereon from April 4th, 1891, amounting to $2,550, in five cheques signed by Bulkley and Ritch, as executors, viz.: On the Central Trust Company one for $100,000, one for $2,266.67 and one for $283.33. On the New York Life Insurance and Trust Company, one for $100,000 and one for $25,000. All of these cheques were drawn payable to the order of Mrs. Lucy Fayerweather, except the cheque for $283.33, which was drawn to the order of Coudert Bros. The cheque for $25,000 was endorsed by Mrs. Fayerweather to Coudert Bros. and deposited by them to their own credit (V, *fols. 2627-34; 2654-60*).

On the 12th day of June, 1891, the said executors procured from Mrs. Fayerweather the execution of the following paper which Fiske had previously prepared for her (*Exhibit 5*; V, *fols. 1395-1400; 1775*):

The Widow's Release.

"*To all to whom these presents shall come or may concern, Greeting:*

"Know ye, that I, Lucy Fayerweather, "widow of Daniel B. Fayerweather, of "the City of New York, for and in con- "sideration of the sum of two hundred and "twenty-five thousand dollars, lawful money

" of the United States, to me in hand paid by
" Justus L. Bulkley, Thomas G. Ritch and Henry
" B. Vaughan, as executors and trustees under
" the last Will and Testament of Daniel B.
" Fayerweather, deceased, and individually,
" and as the representatives of the persons or
" corporations hereinafter named, forming a
" class known as donees, under the deed of gift
" executed by the said Bulkley, Ritch and
" Vaughan, on February 24th, 1891, which sum
" is in compromise and full settlement of any
" and all contests on my part of the will of said
" Daniel B. Fayerweather, deceased, or con-
" cerning his estate, have remised, released
" and forever discharged, and by these pres-
" ents do, for myself and for my heirs, admin-
" istrators and executors, remise, release and
" forever discharge, the said Justus L. Bulk-
" ley, Thomas G. Ritch and Henry B. Vaughan
" as executors and trustees aforesaid, as indi-
" viduals and as representatives of the said
" donees constituting a class, and also the said
" donees, to wit, the persons and corporations
" mentioned in a certain deed of gift duly de-
" livered, made by Justus L. Bulkley, Thomas
" G. Ritch and Henry B. Vaughan on the 24th
" day of February, 1891, which deed of gift
" was introduced in evidence in the probate
" proceedings of the last Will and Testament
" of Daniel B. Fayerweather, deceased, and
" marked Exhibit No. 7, contestants, *and*
" *which said deed of gift is hereby made a*
" *part of this release, in order that the per-*
" *sons constituting said class of donees, and*
" *to whom this release runs*, may be more fully
" known, and also the legal successors, assigns,

" heirs, executors and administrators of all the " aforesaid persons and corporations, of and " from all and all manner of action and actions, " cause and causes of action, suits, debts, dues, " sums of money, claims and demands what- " soever, in law or in equity, which against the " said persons or corporations, or any of them, " I ever had, or now have, or which I or my " heirs, executors or administrators hereinafter " shall, can or may have, for, upon or by rea- " son of any matter, cause or thing whatsoever, " except my claim for the annuity given me " by the will and codicils thereto of said Daniel " B. Fayerweather, deceased, and also my " claim for the increased annuity mentioned in " the agreement dated March 5th, 1891, and " made pursuant to the deed of gift above re- " ferred to.

" IN THE WITNESS WHEREOF I have hereunto " set my hand and seal this 12th day of June, " in the year 1891.

" LUCY FAYERWEATHER. [SEAL.]

" Sealed and delivered in the presence of

" ROBERT J. SMACK."

We call particular attention to the *phraseology* of the foregoing instrument. It does *not* purport *to sell or convey* any interest in the estate of said testator. It contains *no* words *of transfer* of any property to Bulkley, Ritch and Vaughan, individually, or as executors, or trustees; or to the donees under said deed of gift; although it speaks of said donees as the parties " to whom this release runs." It is simply a general release to them

from "all claims and demands, whatsoever," except the annuity and increased annuity. But *no* claim or demand of *any* kind *is specified.*

This is the so-called "RELEASE," which is relied upon in this action, as sufficieni *to convey and transfer to* Messrs. Bulkley, Ritch and Vaughan, and, through them, to the twenty colleges the widow's portion of his residuary estate. real and personal, then vested in her under Chap. 360 Laws of 1860, and worth $1,500,000!

On the 13th day of March, 1891, as already seen, Mrs. Beardsley had given to her husband, Morris B. Beardsley, a power of attorney, authorizing him to ask, demand and receive from said executors the legacy bequeated to her by Mr. Fayerweather's will "together with such additional "sum as my said attorney shall deem satisfactory, "in full settlement of any contest on my part con- "cerning said estate, and upon receipt thereof by, "or payment thereof to my said attorney, a "general release or discharge for the same, to "make, execute and deliver," &c. It further authorized him to withdraw the objections filed by her to the probate of the will and codicils, "and to do whatever else may be neces- "sary to release the estate of the said "Daniel B. Fayerweather, deceased, and his ex- "ecutors, from any and all claims, for me or on "my behalf" (*Exhibit 39;* V, *fols. 1786-91*). Similar powers of attorney to Beardsley were executed by Mrs. Achter and Emma S. Fayerweather, March 16th, 1891 (*Exhibits 16 and 17;* V, *fols. 1466-7; 1791-2*). Beardsley however had *anticipated* these instruments by signing the paper,

March 5th, 1891, as attorney in fact for all three of these ladies, as above stated.

The following payments were made by the executors to Mrs. Beardsley, in mortgages, reduced to a basis of cash as of June 12th, 1891, viz.: June 26th, 1891, $100,000; July 1st, 1891, $100,000 (V., *fols. 2640–1*). *No release was executed by Mrs. Beardsley.*

There was also paid to Beardsley, as attorney in fact for Mrs. Mary W. Achter, the sum of $42,500, June 12, 1891, in satisfaction of the "*gift*" made to her by Messrs. Bulkley, Ritch and Vaughan (V., *fols. 2635–7*).

There was likewise paid to him as attorney in fact for Emma S. Fayerweather, $42,500, June 12th, 1891, in satisfaction of the "*gift*" to her (V, *fols. 2660–65*).

These payments were made *from the estate funds*, by checks signed by Bulkley and Ritch *as executors*, to the order of Morris B. Beardsley, as attorney, &c.; and they were endorsed over to Mr. Rollins, and by him endorsed for deposit (V., *fols. 2635–7; 2660–5*). Beardsley, as such attorney, also gave receipts for these moneys "*in settlement of allowance as per deed of gift and agreement*" (V, *fols. 2651–4*).

There was also delivered to Beardsley, as such attorney, July 1st, 1891, certain mortgages, reduced to a cash basis as of June 12, 1891, amounting to $40,000, and he received them in full satisfaction of the two legacies of $20,000 each bequeathed to Mrs. Achter and Emma S. Fayerweather respectively, in the third codicil to said will (*fols. 2624–7*).

Releases Executed June 12th, 1891.

On the 12th day of June, 1891, Beardsley, as attorney in fact for Mrs. Achter and Emma S. Fayerwerther, respectively, *executed* "*releases*," prepared for him by Fiske, similar to the paper, of that date, signed by Mrs. Fayerweather (*Exhibits Nos. 6 and 7*; V, *fols. 1401–9*; *1775*).

Between the 2d day of October, 1891, and the 26th day of June, 1892, the said executors paid eighty per cent. of the *specific* legacies made to hospitals and colleges in the eighth and ninth clauses of said will (V, *fols. 1649–70*; *1741–51*). They also continued to pay Mrs. Fayerweather's annuity and increased annuity quarterly, to and including May 15th, 1892 (V, *fols. 2468–9*). *But they have made no payments to the colleges, or hospitals, to whom the residuary estate is given under said deed of gift* (V, *fol. 3634*). They still held all *that* part of the *residuary* estate.

It was conceded on the trial of Amherst, &c., *et al. v.* Ritch, *et als.*, that the value of the estate left by Mr. Fayerweather was at least $5,000,000 at the time of his death, over his debts (V, *fols. 1370–1*; *1442–52*). *His debts did not exceed $10,000* (*fol. 1368*). Bulkley and Vaughan swore in the moving papers to advance this cause here, that it was "*upwards of $6,000,000.*" The estate consisted of real and personal property, including his interest in the partnership property of Fayerweather and Ladew. The greater part of his estate was personal property (V, *fols. 1274–92*; *1331–71*; *1620–63*). The house, stable, furniture, horses and carriages and other chattel property given therewith by the will to Mrs. Fayerweather were altogether worth about

$100,000, at the time of Mr. Fayerweather's death (V, *fols. 2960–3*).

It will thus be seen that the residuary estate, as left by the testator at his death, including the principal of the funds, subject to life annuities, was about $3,500,000, to which is to be added the *increase* for the 14 years since that time.

The Secret Trust Concealed.

Throughout all these transactions, Bulkley, Ritch and Vaughan, and their counsel, did *not* concede the fact to be, as it was decided in the State Courts to have been, that they held this residuary estate *upon a secret trust* for the colleges named in the *ninth* clause of the will; or for any *other* institutions. *They never divulged to the widow, or next-of-kin*, or their counsel, WHAT their RIGHTS were in such residuary estate. They *never admitted* that they *had* ANY such rights, although they secretly KNEW that the widow and next-of-kin *owned about one-half of the whole estate*, by force of the act of 1860. As above stated, they took the position then, which they have ever since insisted upon until defeated in all Courts to, and through the New York Court of Appeals—that this whole residuary estate belonged *to them obsolutely;* to do with as they pleased, *un*affected by *any* trust whatsoever (V, *fols. 1308–9; 2054; 2701–3*).

Ritch Swore They Three Owned the Whole Residue Absolutely.

RITCH testified on this point as follows: "I

"don't remember that I ever represented to Mrs. "Fayerweather, or Mrs. Achter, or Emma S. "Fayerweather that I and my co-executors held "this residuary estate of Daniel B. Fayerweather "upon a trust for the benefit of any colleges, or "other institutions, or corporations. *I did insist* "*and claim wherever it was asked that we held* "*that property* ABSOLUTELY *to do with as* WE "*pleased.* Legally, not morally; the absolute "right to do with it as I pleased, subject to "my own conscience, as to what would be "a proper use of it. There OUGHT TO BE A "TOUCH OF conscience in the matter. I *never* "*did* represent, since the death of Daniel B. "Fayerweather, *directly, or indirectly,* to his "widow, Lucy Fayerweather, or to his nieces, Mrs, "Achter, or Emma S. Fayerweather, that I and my "co-executors took this residuary estate, upon a "trust for the benefit of any benevolent, charita- "ble, literary, scientific, educational, or religious, "or other corporations, societies or associations. "*I never* represented to Mrs. Lucy Fayerweather, "the widow, that she was entitled to any *interest* "*in* her husband's estate beyond the amounts "directly specified in the will. I never repre- "sented to Mary W. Achter and Emma S. Fayer- "weather, the nieces, that they, or either of them, "were *entitled to any interest in the estate,* beyond "the sums given to them, specifically by the will "and codicil (V, *fols. 1307–14*). * * *

"*I and my co-executors from the time of making* "*and delivering that deed of gift, Feb. 24, 1891,* "*represented and claimed to all parties interested* "*in the estate that we had an* ABSOLUTE *right to* "*give the property as in that instrument pro-*

" *vided. We* NEVER *explained directly or indi-*
" *rectly, to Mrs. Fayerweather or Mrs. Achter, or*
" *Emma S. Fayerweather, their rights in this es-*
" *tate under Sections 1 and 2 of Chap. 360, Laws*
" *of 1860.* At the time we made the deed of gift
" we had no releases from them. *During all this*
" *time I understood* that one-half of the whole es-
" tate BELONGED TO *the widow and next-of-kin*
" under the provisions of Chap. 360, Laws of 1860,
" in the absence of anything to interfere, if they
" were to claim it—if they would have insisted on
" their claiming it" (V, *fols. 1321–27*).

VAUGHAN testified on this point as follows:

" After the death of Mr. Fayerweather we took
" possession of his estate and proceeded to inform
" *ourselves* of *all* particulars concerning it. We
" accepted the trust for Mrs. Fayerweather under
" the will to pay the annuity regularly as trustees
" until her death and made payments on it (V, *fols.*
" *2035–71*). I saw Mrs. Fayerweather several times
" after her husband's death at her house. After
" the death of Mr. Fayerweather *I did at all times*
" *maintain and insist* that the devises and be-
" quests of Mr. Fayerweather to myself and Ritch
" and Bulkley of his *residuary* estate WERE ABSO-
" LUTE. I ALWAYS DENIED that there was ANY
" trust of the residue. I told Mrs. Fayerweather
" that she could have from the estate all the money
" that she desired, as far as it was in my power to
" give it to her. That was at her house, either in
" November, or December. I never professed to
" be anything else than her *friend.* I do *not* re-
" member saying *anything* else to her about her
" being ENTITLED TO anything more in the estate,

"than the house, lot, furniture and stable, and the "$10,000 legacy and the annuity. I never met "Mrs. Achter, or Emma S. Fayerweather. I had "a conversation with Judge Rollins and Mr. "Beardsley. I NEVER told Judge Rollins that "either Mrs. Achter or Emma S. Fayerweather, "were entitled to ANY portion of the Fayerweather "estate, in addition to the legacies given to them "by the will and codicils. *I told Judge Beards-*"*ley* of this $100,000 in the paper (Exhibit W) "dated November 15, 1890, *and showed him the* "*paper*. I don't know *when* I did that" (V, *fols. 2052–60*).

BULKLEY testified on this point as follows:

"I NEVER *informed* Mrs. Lucy B. Fayerweather, "the widow of Daniel B. Fayerweather, or Mrs. "Mary W. Achter, or Emma S. Fayerweather, *or* "*any one representing them*, at *any* time since "the death of Daniel B. Fayerweather, that I and "Ritch and Vaughan held the residuary estate "*upon* ANY *trust; I never* informed any of those "three persons that they WERE ENTITLED to ANY "interest in that estate, beyond the *specific* lega-'cies, and the annuity made for the widow. I "never met them, except I met Mrs. Fayerweather "at the day of the funeral. I NEVER *informed* "them, *or anybody representing them* that "we held this residuary estate upon a secret trust.

"*It was so held by the executors, of course, that* "*they did* NOT *hold it under a secret trust.* The "whole contest as I understood it was that we did "NOT hold it under a secret trust. THAT was OUR "position, and of the lawyers representing us, "THROUGHOUT THE WHOLE CONTEST, AND EVER "SINCE" (V, *fols. 2699–2703*).

After the Settlement the Widow's Condition was Improved.

After the said settlement had been arrived at Mrs. Fayerweather's condition improved. She suffered much longer than is usual with her disease—diabetes. She was an exceptional case in that disease. Subsequent to the settlement she went on very much as she had been before. Her death finally resulted from the original ailment, July 16, 1892 (V, *fols. 2327; 2350–53*).

Mrs. Fayerweather's Will Probated.

Mrs. Fayerweather left a last will and testament dated June 3d, 1891, and a codicil thereto, dated January 12th, 1892. These instruments were admitted to probate Aug. 27, 1892, in the Surrogate's Court of New York County, and letters testamentary thereon were issued by said Surrogate, Sept. 16, 1892, to John B. Reynolds of New York City and Morris B. Beardsley of Bridgeport, Conn., the executors named therein (V, *Exhibit J 3*; *fols. 2389–2406*). In said will she devised to her sister Miss Joyce the house and stable and chattels, and after certain devises and bequests to others, she gave her also her residuary estate (V, *fols. 2391–8*). She also executed a conveyance of the house and stable to Miss Joyce but retained it in her own custody until her death (V, *fols. 2812–16*).

July 11th, 1891, Miss Joyce married John B. Reynolds (V, *fols. 2804–5*). After said marriage Mr. and Mrs. Reynolds lived in the house with Mrs. Fayerweather (V, *fols. 2370–1*). Mrs. Reynolds was in almost daily attendance upon Mrs. Fayerweather until her death (V, *fols. 2730–1*).

The Suit of Reynolds, as Executor, v. Ritch.

Shortly before her death Mrs. Fayerweather brought an action in the Supreme Court, against said executors, Bulkley, Ritch and Vaughan (entitled Reynolds, as executor, *vs.* Ritch *et al.*), together with the *ninth* article, twenty institutions, and the donees under the deed of gift, *to set aside* the said *settlement* and *releases*. After her death, said action was revived in the name of her said executors, Reynolds and Beardsley, and Mrs. Achter and Emma S. Fayerweather also became parties plaintiff therein. In their complaint in said action the plaintiffs asked for substantially the same relief, and upon the same grounds as in their answers in Amherst *et al. vs.* Ritch *et als.* In their answers in that action, twenty colleges asked for substantially the same relief, and upon the same grounds, as in their complaint in Amherst *et al. vs.* Ritch *et als.* Those answers, served in March, or April, 1893, are said by Bulkley, Ritch and Vaughan to be the *first* knowledge that they ever had that *said colleges were dissatisfied with* said settlements. The executors and donees under the deed of gift undertook to force on the trial of said action, *before it was at issue* as to *all* the parties. The plaintiffs would not go on. They did not *appear*. And on the 25th day of April, 1893, the court *dismissed* the action with costs, which the plaintiffs paid. *There was no adjudication.* The evidence about this so-called "REYNOLDS" action, was *not* received on this trial as evidence of *any* adjudication (V, *2320–4; 2508; 2608–16; 2913; 2805–7; 2751–5; 2260–1; 2236–40*).

After the dismissal of the Reynolds action, the five colleges AMHERST, DARTMOUTH, WILLIAMS, HAMILTON and the UNIVERSITY OF ROCHESTER, began an action, June 26, 1893 (V, *fols. 1739-40*) and made all the other parties in interest defendants (V, *fols. 41-49*). These appellants, who were plaintiffs in the Reynolds action, *were willing to allow it to be dismissed, so as to open the way for the* action of the trustees of Amherst College *et al. vs.* Ritch, etc., *et als.*, in the N. Y. Supreme Court—which was tried as above, before Justice Truax without a jury, where the rights of *all* the parties could be finally determined upon new pleadings, correctly presenting the claims of each party.

Why Has Not This Court Jurisdiction of this Cause?

The next question is—Why has not this Court *jurisdiction* of this cause?

The threshold question is—Had the *Circuit* Court jurisdiction?

To do what?

In a suit of *general equity cognizance*, where the Bill alleged that the requisite *diversity* of citizenship, *amount* and subject-matter existed, and the property was within its circuit; where, *in order to* do justice, it became *necessary* either,

(1) To *set aside* a will;

And to *establish* another will.

Or (2) to set aside a probate decree; *obtained by fraud upon the Court.*

Or (3) to leave such a decree *undisturbed.*

But to require those who so *obtained* such decree,—*and, by it possession and control* of such *property*,—to *deliver* said property to its *owners.*

Mr. Sherman, counsel for complainants, will discuss the first and second propositions.

The Powers of Circuit Courts to deal with this Cause.

1 *Beach* on Mod. Eq. Juris., S. 20:

"It is a well established rule that equity, having taked jurisdiction for *one* purpose, *will retain it for others necessary* to the final settlement of *all* matters, involved in the litigation between the parties, *growing out of and connected with* the subject-matter of the suit; and *will* decide *all* incidental *matters necessary* to enable to make a *final* determination of the *whole* controversy."

Sanders *v.* Soutter, *et al.*, 126 N. Y., 201, O'BRIEN, J.:

"But when a court of equity obtains jurisdiction of the matters for some special purpose, *as to set aside a fraudulent deed or settlement*, made between the *executors* and parties interested in the estate, or to grant some other sperial relief not within the power of the probate court, it *may and very frequently does retain* the case for ALL purposes, and *decree* a COMPLETE *administration, settlement, and distribution* of the ENTIRE *estate. 1 Pow. Eq. Jur., S. 234.*"

Jurisdiction of Equity Court to Do All Needed to Give Justice.

VAN ALLEN *v.* N. Y. E. R. R. Co., *et al.*, 144 N. Y., 179, O'BRIEN., J.:

"The Jurisdiction of Equity depends upon the position of the plaintiff, and the relief to which he is entitled at the time the suit is brought. The measure of the relief is adapted to the situation at the time of the decree. When the jurisdiction has once attached, it is not affected by changes which occur subsequently, so long as any cause of action survives, upon the facts alleged, although such changes may affect the nature and extent of the RELIEF to which the party may be entitled. No PRINCIPLE IS BETTER ESTABLISHED, or more frequently asserted, than that, when a Court of Equity has once acquired jurisdiction over a cause for any purpose, IT MAY RETAIN the cause for ALL PURPOSES, and proceed to a final determination of ALL the matters at issue. (McGean *v.* M. E. R. Co., 133 N. Y., 16; Valentine *v.* Richardt, 126 N. Y., 272.) * * * cites 102 U. S., 691, and other cases.

180. "The sole ground upon which the plaintiff was permitted to invoke the jurisdiction of Equity MAY NO LONGER EXIST, in consequence of events which have transpired SUBSEQUENT TO the commencement of the action, but that fact alone WILL NOT deprive the Court of the jurisdiction which has once attached, so long as there still remains ANY injury to be redressed, though, as to that, there may be an adequate remedy at law. The Court in such cases will NOT send the party to another tribunal for relief; but, as in cases where the jurisdiction rests solely upon a demand to restrain the infringment of a patent, which expires *pendente lite*, DAMAGES will be awarded. * * * (Cites cases.)"

DUDLEY *v.* CONGREGATION, &c., of ST. FRANCIS, 138 N. Y., 459, O'BRIEN, J.:

"The established rule, that, when equity has obtained jurisdiction of the parties, and the subject-matter of the action, IT MAY ADAPT THE RELIEF TO THE EXIGENCIES OF THE CASE, even to the extent of rendering a personal judgment, IN ORDER TO PREVENT A FAILURE OF JUSTICE, does not apply here. That rule applies when the general basis of fact upon which equitable relief was sought, has been made out; but, for some reason, it becomes impracticable to grant such relief; or, where it would be insufficient; and not to a case like this, where it appears that there never was, in fact, any ground for equitable relief, whatever, but the sole remedy was an action at law.

When facts are made out, which bring the case within the GENERAL jurisdiction of Equity, the Court will NOT allow the case to fail because the specific relief prayed for is no longer practicable; but in such a case, as substitute for the relief demanded, WILL AWARD AN EQUIVALENT IN DAMAGES, THUS ENDING THE CONTROVERSY, instead of sending the parties to a Court of Law for that purpose (Valentine *v.* Richards, 126 N. Y., 277; Lynde *v.* El. R. R. Co., 129 *id.*, 274; Van Rensselaer *v.* Van Rensselaer, 113 *id.*, 213)."

KOEHLER *v.* N. Y. El. R. R. Co., 159 N. Y., 223, BARTLETT, J.:

"It is a principle well established, and frequently asserted that when a Court of Equity has once acquired jurisdiction over a cause for any purpose, it may retain it for ALL purposes, and proceed to a final determination of the matters in issue (McGean *v.* Met. E. R. Co., 133 N. Y., 116; Valentine *v.* Richardt, 126 N. Y., 272).

223. It is also a familiar rule that jurisdiction of

equity depends upon the position of the plaintiff, and the relief to which he is entitled AT THE TIME the suit IS BROUGHT; the measure of the RELIEF is adapted to the situation at the time of THE DECREE (Van Allen *v.* N. Y. El. R. R. Co., 144 N. Y., 174)."

VALENTINE *v.* RICHARDT, 126 N. Y., 277, O'BRIEN, J.:

"It is a familiar principle that a Court of Equity, having obtained jurisdiction of the parties, and the subject-matter of the action, will adapt its relief to the exigencies of the case. It may order a sum of money to be paid to the plaintiff, and give him a personal judgment therefor, when THAT form of relief becomes necessary IN ORDER TO PREVENT A FAILURE OF JUSTICE; and when it is for any reason impracticable to grant the specific relief demanded (Martha *v.* Curley, 90 N. Y., 372; Van Rensselaer *v.* Rensselaer, 113 N. Y., 214; Bell *v.* Merrifield, 199 *id.*, 207)."

The powers of Circuit Courts of the United States have been long established by the Constitution, and the laws.

This Court has frequently defined them.

Thus in Payne *v.* Hook, 7, Wallace, 430, by DAVIS, J., it said:

> "A proceeding *at law* is *not* flexible enough "to reach the fraudulent conduct of the "administrator, which is the ground work "of the bill. Nor to furnish proper relief "against it. It is, however, *well settled* that a "Court *of Chancery, as an incident to its* "*power to enforce trusts*, and make those

"holding a *fiduciary* relation, account, HAS "jurisdiction *to compel executors* and adminis- "trators *to account and distribute* the assets "in their hands.

"The bill under review has *this* object, and "and nothing more. It seeks to compel de- "fendant *to account and pay over* to Mrs. "Payne, her rightful share in the estate of her "brother. And, in case he should not do it, "to fix the liability of the sureties on his bond.

"* * *

"432. It is insisted that they can not be "sued *in equity*. If *this* doctrine were to pre- "vail, a Court of Chancery, in the exercise of "its power to compel an administrator to ac-

" count for the property of his intestate, *would*
" *be unable to do complete* justice.

" For if, on settlement of the account, a
" balance should be found due the estate, the
" parties in interest, in case the administrator
" should fail to pay, would be turned over to a
" Court *of law*, to *renew* the litigation with
" his sureties. A Court of Equity does not
" act in *that* way.

" It disposes of a case so as to END litiga-
" tion,—*not* to foster it ;
" to *diminish* suits,—*not* to *multiply* them.

" *Having* power to determine the liability
" of the administrator, for his misconduct, *it*
" *necessarily has an equal power*, in order to
" meet the possible exigency of the adminis-
" trator's inability to satisfy the decree, to set-
" tle the amount, which the sureties on the
" bond, in that event would have to pay."

" In Barrow *v.* Hunton, 99 U. S., 83, this
" Court, by BRADLEY, J., said :

" On the other hand, if the proceedings are
" tantamount to a bill in equity, to set aside
" a decree, for fraud, *in the obtaining thereof ;*
" *then* they constitute, *an original and inde-*
" *pendent* proceeding ; and, according to the
" doctrine laid down in Gaines *v.* Fuentes (92
" U. S., 10), *the case might be within the cog-*
" *nizance of the Federal Court.*"

" In Hess *v.* Reynolds, 113 U. S., 78, the
" Court, by MILLER, J., said :

" BUT NEITHER THE PRINCIPLE OF CON-
" VENIENCES, NOR THE STATUTES OF A STATE,

"CAN DEPRIVE THEM (THE COURTS OF THE "UNITED STATES) OF JURISDICTION TO HEAR "AND DETERMINE, A CONTROVERSY BETWEEN "CITIZENS OF DIFFERENT STATES, WHEN "SUCH A CONTROVERSY IS DISTINCTLY PRE-"SENTED; BECAUSE THE JUDGMENT MAY AF-"FECT THE ADMINISTRATION OF DISTRIBUTION "IN ANOTHER FORUM, OF THE ASSETS OF THE "DECEDENT'S ESTATE.

"THE CONTROVERTED QUESTION OF DEBT OR "NO DEBT, IS ONE WHICH, IF THE REPRESEN-"TATIVE IS A CITIZEN OF A STATE DIFFERENT "FROM THAT OF THE OTHER PARTY, THE "PARTY PROPERLY SITUATED, HAS A RIGHT "GIVEN BY THE CONSTITUTION OF THE UNITED "STATES, TO HAVE TRIED, ORIGINALLY, OR BY "REMOVAL, IN A COURT OF THE UNITED STATES "WHICH CANNOT BE DEFEATED BY STATE "STATUTES, ENACTED FOR THE MORE CON-"VENIENT SETTLEMENT OF ESTATES OF DE-"CEDENTS." (CITES CASES.)

In ARROWSMITH *v.* GLEASON, 129 U. S., the Court, by HARLAN, J., say:

"But it is insisted that the Circuit Court of "the United States, sitting in Ohio, is *without* "jurisdiction to make such a decree, as is "specifically prayed for, namely: a decree "*setting aside* and vacating the orders of the "Probate Court of Defiance County.

"If by this is meant only that the Circuit "Court cannot, by its orders *act directly* upon "the Probate Court; or that the Circuit Court "cannot compel or require the Probate Court "to set aside or vacate its own orders; the "position of the defendants could not be "disputed.

"But it does not follow that the right of "Harmening, in his life time, or of his heirs "since his death—*to hold* these lands, as "against the plaintiff, cannot be questioned in "a court of *general equitable* jurisdiction— "upon the ground *of fraud*.

"If the case made by the Bill is clearly "established by proof, it *may be* assumed that "some State Court of superior jurisdiction, "and equity powers, and having before it all "the parties interested, might afford the plain- "tiff, relief of a substantial character.

"But whether that be so or not, it is diffi- "cult to perceive why the Circuit Court *is not* "*bound* to give relief according to the rec- "cognized rules *of equity*, as administered in "the Courts of the United States—the plain- "tiff being a citizen of Nevada, the defend- "ants citizens of Ohio, and the value of the "dispute, exclusive of interest and costs, be- "ing in excess of the amount required for the "original jurisdiction of such Courts.

"A leading case upon this point is Payne *v.* "Hook, 7 Wall., 425, 430. That was a suit, in "the Circuit Court of the United States for "Missouri, by a citizen of Virginia, against a "public administrator, to obtain a distributive "share of an estate, then under administra- "tion, in a Court of Missouri.

"It was objected that the complainant, if a "citizen of Missouri, could obtain redress *only* "through the local Probate Court; and that "she had no better, or different, rights for rea- "son of being a citizen of Virginia.

"But this Court, observing that the Consti- "tutional right of the citizen of one State to

" sue the citizen of another State in the Courts " of the United States, instead of resorting to " a State tribunal—would be worth *nothing* if " the Court in which the suit was instituted, " could *not* proceed to judgment and afford a " suitable measure of redress, said:

" 'We have repeatedly held that the jurisdic- " tion of the Courts of the United States, over " controversies of citizens of *different* States, " *cannot be* impaired by the laws *of the State* " which prescribed the modes of redress in their " Courts; or which regulate the distribution " of their judicial power'.

" If legal remedies are sometimes modified, " to suit the changes in the laws of the States, " and the practice of their Courts,—IT IS NOT " SO WITH EQUITABLE. The equity jurisdiction " conferred on the Federal Courts, is the same " as that the High Court of Chancery in Eng- " land possesses; its subject to neither limita- " tion or restraint by State legislation; and *is* " *uniform throughout* the different States of " the Union.

" The Circuit Court of the United States for " the District of Missouri, therefore, HAD JURIS- " DICTION to hear and determine this contro- " versy, notwithstanding the peculiar structure " of the Missouri Probate system; *and was* " *bound to* exercise it, if the Bill, according to " the received principles of equity, states a case " for equitable relief.

" The absence of a complete and adequate " remedy, at law, is the *only* test of equity " jurisdiction; and the application of this prin- " ciple to a particular case must depend on the " character of the case, as disclosed in the " pleadings."

"While there are general expressions in some "cases *apparently* asserting a contrary doc- "trine, the *later* decisions of this Court show "that the proper Circuit Court of the United "States MAY,—without controlling, supervis- "ing or annulling the proceeding of State "Courts, GIVE SUCH RELIEF—in a case like the "one before us, as is consistent with the prin- "ciples of equity.

"As said in Barrow *v.* Hunton, 99 U. S., 80, "85: 'The character of the case is *always* "open to examination for the purpose of de- "termining whether,—*ratione materiæ*,—the "Courts of the United States are incompetent "to take jurisdiction thereof. STATE RULES "ON THE SUBJECT CAN NOT DEPRIVE THEM OF "IT'.

"This whole subject was *fully* considered in "Johnson *v.* Waters, 111 U. S., 640, 667.

"That was an original suit, in the Circuit "Court of the United States, for the District "of Louisiana. It was brought by a citizen of "Kentucky, against citizens of Louisiana.

"Its main object was *to set aside* as fraudu- "lent and void, certain sales made by a testa- "mentary executor, under the orders of a "Probate Court in the latter State.

"It was contended that the plaintiff was con- "cluded by the proceedings in the Probate "Court,—which was alleged to have *exclusive* "jurisdiction of the subject matter;—and that "*its* decision *was conclusive* against the world, "especially against the plaintiff, a *party* to the "proceedings.

"This Court, while conceding that the "administration of the estate there in question

"properly belonged to the Probate Court; "and that,—in a *general* sense,—the decisions "of that Court *were* conclusive and binding, "especially upon parties, said:

"'But this *is* NOT *universally true.* The "most solemn transactions and judgments "MAY BE SET ASIDE OR BE RENDERED INOPERA- "TIVE FOR FRAUD,—at the instance of the "parties'.

"The fact of being *a party* does *not* estop a "person from obtaining in a Court of Equity, "relief *against fraud.*

"It is *generally parties* that are *the victims* "*of* fraud.

"The Court of Chancery is *always* open, to "hear complaints against it, whether commit- "ted *in pais, or in, or by means of, judicial* "*proceedings.*

"In such cases, the Court does *not* act *as a* "*Court of reviews; nor* does it inquire into "any irregularities, or errors of proceeding, in "another Court.

"BUT IT WILL SCRUTINIZE THE CONDUCT OF "THE PARTIES; AND IF IT FINDS THAT THEY "HAVE BEEN GUILTY OF FRAUD IN OBTAINING "A JUDGMENT OR DECREE—IT WILL DEPRIVE "THEM OF THE BENEFIT OF IT AND OF ANY "INEQUITABLE ADVANTAGE WHICH THEY HAVE "DERIVED UNDER IT. Citing Story's Eq. "Jurisprudence, Secs. 1570–1573; Kerr on "Fraud and Mistake, 352, 353; Gaines *v.* "Fuentes, 92 U. S., 10; and Barrow *v.* Hun- "ton, 99 U. S., 80. * * *

"P. 101. *These principles control the* "*present case,* which, although involving

"rights arising under judicial proceedings in "*another* jurisdiction—IS AN ORIGINAL, INDE- "PENDENT SUIT FOR EQUITABLE RELIEF BE- "TWEEN THE PARTIES;

"Such relief being grounded upon A NEW "STATE OF FACTS, DISCLOSING NOT ONLY IMPO- "SITION UPON A COURT OF JUSTICE IN PRO- "CURING FROM IT AUTHORITY to sell an in- "fant's lands, when there was *no* necessity "therefor; *but actual fraud* in the exercise, "from time to time, of the authority so ob- "tained.

"As this case *is* within the equity jurisdic- "tion of the Circuit Court—*as defined by* the "Constitution and laws of the United States, "THAT COURT MAY, BY ITS DECREE, LAY HOLD "OF THE PARTIES; AND COMPEL THEM TO DO "WHAT, ACCORDING TO THE PRINCIPLES OF "EQUITY THEY OUGHT TO DO; THEREBY SE- "CURING AND ESTABLISHING THE RIGHTS OF "WHICH THE PLAINTIFF IS ALLEGED TO HAVE "BEEN DEPRIVED BY FRAUD AND COLLUSION."

In Marshall *v.* Holmes, 141 U. S., 597, the Court, by HARLAN, J., said:

"Is it true that a Circuit Court of the "United States, in the exercise of its equity "powers, and where divers citizenship gives "jurisdiction over the parties, may not, in any "case, deprive a party of the benefit of a judg- "ment fraudently obtained by him in a State "Court, the circumstances being such as would "authorize relief by the Federal Court, if the "judgment had been rendered by it, and not "by a State Court?

"A leading case upon this subject is Barrow "*v.* Hunton, 99 U. S., 80 . * * * It "said: * * * 'On the other hand, "if the proceedings are tantamount to "a bill in equity *to set aside a de-* "*cree for fraud*, in the *obtaining* thereof— "*then they constitute an original and inde-* "*pendent proceeding*; *and*, according to the "doctrine laid down in Gaines *v.* Fuentes, 92 "U. S., 10, the case *might be* within the cog- "nizance of the Federal Courts.'

"The distinction between the two classes of "cases may be somewhat nice, but it may be "affirmed to exist.

"In the one there would be a mere review- "ing of errors and irregularities; or of the "legality and correctness of the State Courts.

"And, in the *other* class, the investigation "of a *new* case, arising upon *new* facts, al- "though *having relation to* the validity of an "actual judgment or decree, or of the party's "right to claim any benefit by reason thereof.

"These authorities *would seem to place* BE- "YOND QUESTION the jurisdiction of the Cir- "cuit Court *to take cognizance of the present* "suit, which is none the less *an* ORIGINAL *in-* "*dependent suit*, *because* it relates to a judg- "ment obtained in the Court of *another* juris- "diction.

"While it cannot require the State Court it- "self to set aside or vacate the judgments in "question, IT MAY, as between the *parties* be- "fore it, if the facts justify such belief, AD- "JUDGE that Mayer SHALL NOT ENJOY THE IN- "EQUITABLE ADVANTAGE *obtained by* HIS "JUDGMENTS. A decree to THAT effect would

" operate *directly upon* HIM, and would NOT
" controvene the provision of the statute, pro-
" hibiting a Court of the United States from
" granting a writ of injunction to stay pro-
" ceedings in a State *Court.* * * *

" It was contended at the Bar that the cases
" of Nougue *v.* Clapp, 101 U. S., 551; and
" Graham *v.* Railroad Co., 118 U. S., 177, an-
" nounce a *different* rule.

" We do NOT understand those cases to pro-
" ceed upon any ground *inconsistent with* the
" principles announced in the cases above cited.
" It is true that in Nougue *v.* Clapp the Cir-
" cuit Court of the United States was asked TO
" SET ASIDE a decree of a State Court—as well
" as a sale had under it, upon the ground that
" the decree was obtained and the sale con-
" ducted pursuant to a fraudulent conspiracy,
" to which the person obtaining the decree,
" and who became the purchaser at the sale,
" was a party.

" Here the resemblance between that case
" and the one before us *ends.* For, in Nougue
" *v.* Clapp it did *not* appear that the facts con-
" stituting the fraud were NOT, *before* the ren-
" dition of the decree, *within the knowledge*
" *of* the party seeking its annulment; or
" COULD NOT *have been discovered* in time to
" bring them, in some appropriate mode, to
" the attention of the Court while the decree
" was within its control.

" For aught that appears, that suit was
" brought simply to obtain *a rehearing*, in the
" Circuit Court of the United States sitting in
" equity of issues that *were*,—or, by proper
" diligence *could have been*, fully determined
" in the suit at law in the State Court.

"The relief there asked could not have been "granted, consistently with the rule that "equity will not interfere with a judgment at "law, even where the party has an equitable "defense, *if* he could, by the exercise of rea- "sonable diligence, have availed himself of "that defense, in the action *at law*, to which "he was a party.

"This requirement of diligence is, as it "ought to be, enforced with strictness. * * *

"601. The suit being, in its general nature, "one of which the Circuit Court of the United "States *could* rightfully take jurisdiction "(quoting from Johnson *v.* Waters, 111 U. S., "667, BRADLEY, J.):

"'In such cases the Court does *not* act as a "Court *of review;* nor does it inquire into "irregularities or errors of proceeding in an- "other Court.

"'But *it will scrutinize the conduct of* the "*parties;* and if it finds that *they* have been "*guilty of* FRAUD IN OBTAINING a judgment "or decree, *it will deprive them of* the *benefit* "*of* it; and of any *in*equitable advantage, "which they have derived under it.'

"599. In Arrowsmith *v.* Gleason, 129 U. S., "101—'The grounds of the jurisdiction of the "Circuit Court of the United States, to enter- "tain an original suit,—the parties being citi- "zens of different States, to set aside a sale of "lands, fraudulently made by the guardian of "an infant, under authority derived from a "probate Court, are thus stated * * * "(*supra*).

These principles *control the present case*, which,

although involving rights arising under judicial proceedings in another jurisdiction, *is an original, independent suit*, for *equitable* relief, between the parties; such relief being grounded upon a *new* state of facts, *disclosing not only imposition upon* a *Court* of Justice, *in procuring from it authority* to sell an infant's lands, when there was *no* necessity therefor; but *actual* fraud in the exercise, from time to time, of the *authority so* obtained.

As the case *is* within the *equity* jurisdiction of the Circuit Court, as defined by the Constitution and laws of the United States, *that* Court MAY, by its decree, LAY HOLD OF THE *parties*, AND COMPEL *them* TO DO, WHAT, ACCORDING TO THE PRINCIPLES OF EQUITY THEY *ought to* DO; *thereby* SECURING AND ESTABLISHING *the right*, of which the plaintiff is *alleged to* have been deprived *by fraud, and collusion.*

We are, therefore, to inquire, upon this appeal, whether the Bill *discloses a cause of action*, entitling the appellant to relief in a Court of Equity.

The Bill and Cross Bill Aver the Necessary Jurisdictional Facts.

Cowley *v* Northern Pacific R. R. Co. 159, U. S., 581, BROWN J.:

> "So far as the right of the Court to deal "with this petition is concerned, it makes "*no* difference that the Court found that "there was *no* fraudulent conduct on the "part of the attorneys; *since the petition* "*averred a case of fraud, within* the tenth "subdivision of Section 436.
>
> "*This was sufficient to give the Court ju-* "*risdiction to act.*"

In the present case,—do the Bill and Cross-Bill as was said in Marshall *v* Holmes (*supra*) then "disclose a cause of action, entitling appellants to relief in a Court of Equity"? Do they aver that the decrees of the Surrogate, probating the will of Mr. Fayerweather, WERE OBTAINED BY FRAUD?

The "Admitted Exception to" the Rule of Res Adjudicata.

In U. S. *v.* Throckmorton, 98 U. S. 61, this Court, by MILLER, J., defines *when* a decree *is obtained by fraud.*

After stating what *constitutes res adjudicata*, and quoting the maxim, "Interest Rei-Publicae", &c., it continues thus:

> "But *there is an admitted exception to* this "general rule, in cases where, by reason of "something done by the successful party to "a suit, there was in fact

No Adversary Trial or Decision of the Issue

in the case.

Where *the* unsuccessful party *has been prevented from* exhibiting FULLY his case, *by fraud or deception, practiced on him by his opponent*,—as by keeping him away from Court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney, fraudulently, or without authority, assumes to represent a party, and connives at his defeat; or where

an attorney, regularly employed, corruptly sells out his client's interest to the other side. These, and similar cases, *which show* that *there has never been*, A REAL *contest, in the trial or hearing of* the case, *are reasons for* which a *new* suit MAY BE sustained, *to set aside and annul the former judgment or decree;* and *open* the case for a *new*, and a FAIR hearing.

See "Wells' Res Adjudicata, Section 499"; Pearce *v.* Olney, 20 Conn., 544; Weirich *v.* DeZoya, 7 Ill., 385; Kent *v.* Ricards, 3 Md. Ch., 392; Smith *v.* Lowry, 1 Johns. (N. Y.) Ch., 320; DeLouis *et al. v.* Meek *et al.*, 2 Iowa, 55;

> "In all these cases, and many others which
> "have been examined, relief *has been* granted
> "on the ground that, *by some fraud* PRAC-
> "TICED DIRECTLY UPON THE *party* SEEKING
> "RELIEF against the judgment or decree—THAT
> "PARTY HAS BEEN PREVENTED FROM PRESENT-
> "ING ALL OF HIS CASE TO THE COURT."

The Grounds stated at Bar.

The ground stated in the last clause just quoted is the ground at Bar—namely:

that *relief has been granted* on the ground that the party seeking it "HAS BEEN PREVENTED FROM PRESENTING ALL of his case to the Court."

The Bill avers thus (I, 16), that the widow and kin *were prevented from presenting all* of their case to the Surrogate and from having an adversary *trial* or decision by the Trial Court, Justice Truax, in Amherst *v.* Ritch, by Ritch, Bulkley and Vaughan *fiduciaries;*

who *knew* the facts which would have disclosed the rights of these ladies;

who knew that the latter did *not* know them;

who suppressed said facts from them and from their counsel;

and misrepresented to them that they had NO interest whatever in said residue; that it belonged to said three fiduciaries ABSOLUTELY;

when all Courts which have dealt with the questions—namely, the three State Courts, and the two Federal Courts—have steadily held that NOT A DOLLAR OF of said residue belonged to said three fiduciaries ABSOLUTELY.

Nor to their donees under the deed of "gift". The Bill avers that said three fiduciaries were named as absolute residuary legatees, *only by* the *fraud* of two of them, practiced upon the testator.

That the plaintiffs are advised and insist that the defendants Ritch, Bulkley and Vaughan, having obtained the residuary estate—devised and bequeathed by the testator, in the manner hereinbefore set forth—are chargeable in this Court *as trustees thereof* for complainants.

* * * (I, 17). "That pending such contest and proceeding to probate said will and codicils, the said Bulkley, Ritch and Vaughan were, as aforesaid, *the trustees of* the *complainants*, in respect of the said residuary estate; and under a *fiduciary* duty towards complainants to make FULL DISCLOSE (should be DISCLOSURE) of ALL the facts affecting the rights of these complainants in and to said residuary estate; and not to set up, or carry on any *adversary* proceedings, *in derogation* of such trust; *or to combine* or confederate with any of the other parties to this suit against complainants, *to coerce them to* surrender, or *release*, their interest in said residuary estate, for the benefit of any *other* of these defendants, or to set up and maintain any

colorable claims, or right, to the said interest of complainants, in favor of any others of said defendants;

Or to raise any cloud upon the title thereto of complainants; *and not to obstruct, hinder or delay* complainants, in the recovery of their said interests; and not to place complainants *at any disadvantage* in dealing with said Bulkley, Ritch, and Vaughan,—or any others of said defendants, *by withholding* their said *interests; or threatening* them *with litigation, duress* of property, or loss, *to induce* these complainants *to* surrender *or release* their said interests; *and not to hold out, or represent,* to complainants, that any *illegal* or *unfounded* trust, existing or giving color as aforesaid *was a valid bar,* and impediment, to the said *rights* of these complainants."

That in having the last codicil made,

which *on its face,* gave this residue, to these three fiduciaries *absolutely;*

one of them,—Vaughan, while the testator was at the point of death, *excluded* all persons who could interfere with what Vaughan was doing;

that the testator *was unable to hear or see* said *codicil;*

or to sign the same; that "the act was the act and will *of said Vaughan;*

and *not* of said Daniel B. Fayerweather.

Said *Vaughan used the hand of* said Daniel B. Fayerweather to sign the codicil.

But the *mental* act was that *of said Vaughan.*"

That complainants *did not know* that they had a clear *right to* share, as next-of-kin, in one-half of said estate;

but, on the contrary, said Ritch,—a New York lawyer,—and said other two *fiduciaries, repre-*

sented to complainants by learned counsel,—that they had *no* enforceable claims upon said estate.

That said three *fiduciaries owned* said residue *absolutely;*

and *threatened to withhold* all share in said estate;

and *to prolong litigation, to defeat* all claims of complainants. That *to buy peace* and as an act *of grace*, with *no* duty towards complainants, they would give them about one-eighth of their actual interest in said residue, if they would *release* all claims;

and withdraw all objections to said probate.

That *they were not on equal terms with* said *fiduciaries;*

were of scanty means; and *unable to continue* a distant contest;

and *to judge of the truth of* said representations.

That, so induced, they released each for $42,500, a share of said residue of upwards of $500,000;

all of which was unknown to them, *and was concealed from them by defendants.*

(P. 20.) That *they did not learn* the facts as to said last codicil, and their rights in said estate, *until* about January 1st, *1896*—by the judgment of the General Term;

"And then refrained from bringing this suit because of the pendency of the said action;

and the reasonable expectation of amending and securing A TRIAL OF the issues therein", from the N. Y. Court of Appeals—whose decision came down about a year later.

(I, P. 21.) They charge and allege that "The decrees of the Surrogates of the County of New York, whereby said testamentary papers were ad-

mitted to probate, are and each of them is, FRAUDULENT, null and void;

and should be set aside; * * *

and that the Court should, in lieu thereof, establish and compel due performance of the *true* and lawful last will and testament of said Daniel B. Fayerweather;

" or in lieu of any such, compel the payment and distribution of the estate of said Daniel B. Fayerweather *according to law*". * * *

(I, 22.)

That, by virtue of the premises, complainants are entitled as heirs-at-law, of said testator, to recover of said three beneficiaries, so much of said residuary estate as constitutes their lawful proportion thereof;

notwithstanding their said releases;

and to have said releases adjudged void;

(I, p. 23.) AND THAT THEY ARE ENTITLED TO SUCH RELIEF HEREIN AS MAY, UPON THE WHOLE CASE APPEAR TO BE EQUITABLE.

For all of which special, as well as for *general* relief, Your Orators pray".

The Grounds of this Cross Bill.

The Cross Bill avers (I, p. 273), that

"The said decrees of said Surrogate's report, WERE OBTAINED BY FRAUD AS aforesaid;

* * * That certain proof, which was well known to them (that is, to said three *fiduciaries*), being proof of the facts herein, in that behalf alleged, *was by them actively suppressed;* which would have *defeated* said probate;

and *without* the agreement of the widow *to re-*

lease, used by said *fiduciaries to prevent* a contest;
and due presentation of *full* proof;
said decrees would *not* have been *rendered.*
(I, p. 273.) That said three fiduciaries account for said estate, which has come into their hands,
and pay over such sums as appear upon such accounting to be due from them 'to this Cross-Complainant;
OR IN SUCH MANNER AS MAY BE EQUITABLE; OR THE COURT MAY DIRECT.'
That the other defendants so account, namely, those who have received any of said residue,
that said agreement to release, and said release itself, be declared void and cancelled.
'That this complainant and said next-of-kin, RECEIVE THEIR RESPECTIVE SHARES OF SAID ESTATE.
'For an Injunction and a Receiver.
'And for GENERAL relief.' "

The Pleas Allege Simply Res Adjudicata.

The Pleas to said Bill and Cross-Bill, allege that the decision of Amherst *et al. v. Ritch, et al.*, was, as to our present claim *res adjudicta.*

Replications Put the Truth of the Pleas in Issue.

Under our *Replications* to said pleas, we went at length into *the truth* of the facts alleged in the pleadings.

We constantly assert and offer evidence that said decrees *were obtained by fraud*, practiced upon the Court,
Upon the widow and next-of-kin;
and upon their counsel.

The Final Decree.

"(IV, 782.) In the Final Decree it is recited
" that

" The Court, after due advisement held and
" decided that the cause of action alleged in
" the said Bill, and that alleged in the Cross-
" Bill were barred by an adjudication in the
" prior litigation between the same parties".
" to wit, in

Amherst, etc., *et al. v.* Ritch, *et als.*

Tha Complainants and Cross-Complainants, having objected to the introduction of the record of said action, and having moved to strike it from the record herein, and to ignore and disregard said judgment

" On the ground that State of New York, has by said judgment, as an adjudication of the matters herein, each, all, or any of them, DEPRIVED THEM, AND EACH OF THEM OF PROPERTY WITHOUT DUE PROCESS OF LAW ;

AND HAS DENIED TO THEM, AND EACH OF THEM THE EQUAL PROTECTION OF THE LAWS ;

whereby said judgment, as such adjudication, is null and void ;

and said complainants, having in their Bill, prayed that said judgment be treated as void, for said reasons ;

and the Court having held it valid, as, and for the purposes alleged in said pleas ;

and all objections of complainants and cross-complainant to evidence, orders, and proceedings taken or had therein, and which appear in the record at final hearing, being hereby overruled ; it was

adjudged that said pleas, said Bill and Cross-Bill be dismissed.

And that, the question of costs is hereby reserved, unless an appeal is taken from this decree; and in case of an appeal, is left to the Appellate Court for determination.

The Right of Direct Appeal.
(3d. Ed.) Foster's Fed. Pr.

§ 17. A suit *arises under* the Constitution or a law of the United States whenever its correct decision *depends upon the* CONSTRUCTION of *either*. Cohens *v.* Virginia, 6 Wh. 379; Wiley *v.* Sinlker, 179 W. S., 58; Defiance Water Co. *v.* Defiance, 191 U. S., 190, Fuller, Ch., J.

Diverse citizenships did not exist. * * *

It must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially *involve a dispute or controversy* as to a RIGHT *which depends* on the *construction of the Constitution*, or some law or treaty of the United States before jurisdiction can be maintained on this ground.

*Green Bay &c. Co.*v. *Patten Paper Co.*,172 U. S., 67; SHIRAS, J.

"But *no particular form of words* has ever been declared *necessary* in which the claim of Federal rights must be asserted.

It is sufficient if it appears from the record that such rights *were specially set up or claimed in* the State Court in such manner as to bring them to the attention of that Court.

Giles v. Hains et. als., 191 U. S.; HOLME, J.:

"The certificate was unnecessary to found the jurisdiction of this Court, and *could not narrow it.*"

Smith v. McKay, 161 U. S., 358; SHIRAS, J.:

"When the requisite *citizenship* of the parties appears and the subject matter is such that the Circuit Court is competent to deal with it, THE JURISDICTION OF THAT COURT ATTACHES."

Homer *v.* United States No. 2, 143 U. S., 577; BLATCHFORD, J.:

"We are further of the opinions that where an appeal or writ of error is taken DIRECT to this Court, under Section 5 of the Act of March 3, 1891, in a case in which the Constitutionality of a law of the United States is drawn in question—this Court acquires jurisdiction OF THE ENTIRE CASE, and of ALL questions involved in it; and NOT merely of the question of the Constitutionality of the law of the United States."

Scott *v.* Donald, 165 U. S., 71; SHIRAS, J.:

"Although the question of the jurisdiction of the Court below has not been certified to as in the manner provided by the 5th Section of the Judiciary Act of March 3rd, 1891;

Yet, as the Case is before us, in a case in which the law of a State *is claimed to be* in contravention of the Constitution of the United States under another clause of that Statute; WE HAVE JURISDICTION of the ENTIRE Case, and of ALL questions involved."

Press Publishing Co. *v.* Munroe, 164 U. S., 110, GRAY, J.:

"It also lies directly from the Circuit Court to this Court in cases involving the construction or application of the Constitution, * * * and in ANY of these cases the appellate jurisdiction of this Court IS NOT LIMITED to the Constitutional question; but extends to the determination OF THE WHOLE CASE. * * * Of suits of a civil nature, at law or in equity, the Circuit Courts of the United States have original jurisdiction by reason of the citizenship of the parties in cases between citizens of *different* States, or between citizens of a State and aliens.

And by reason of the cause of action arising under the Constitution or laws of the United States."

Chappell *v.* United States, 160 U. S., 509; GRAY, J.

But no question of jurisdiction having been separately certified, or specified;

and the writ of error *having been allowed* WITHOUT RESTRICTION OR QUALIFICATION—this Court, under the *other* clause of the statute above cited, HAS appellate jurisdiction of this case, as one in which the constitutionality of a law of the United States was drawn in question;

and having acquired jurisdiction under this clause, HAS the power to dispose, *not merely of the constitutional question, but of the* ENTIRE CASE, including ALL questions, *whether of jurisdiction* OR OF MERITS.

Davis & Farnum Mfg. Co. *v.* Los Angeles, 189 U. S., 216; BROWN, J.:

"As the Bill in this case is based not only upon *diversity* of citizenship; but upon the *alleged* unconstitutionality of the Municipal ordinances

of November 25, 1901, and March 3, 1902, as impairing the obligation of Mrs. Dobbins's contract with the City under prior ordinances;

An appeal lies directly to this Court;

And upon such appeal, the WHOLE case is opened for consideration.

Horner *v.* U. S. No. 2, 143 U. S., 570.
Chappell *v.* U. S., 160 U. S., 449."

Carey *v.* Houston & Texas Railway Co., 150 U. S., 181; FULLER, CH. J.:

"In order to hold this appeal maintainable as within the * * * fourth class * * * the construction or application of the Constitution of the United States must be involved as controlling, although on appeal or writ of error ALL OTHER questions WOULD BE OPEN TO DETERMINATION if inquiry were not rendered unnecessary by the ruling on that arising under the Constitution. Horner *v.* U. S., 143 U. S., 570. * * * In passing upon the validity of that decree the Circuit Court decided no question of the construction or application of the Constitution; and, as we have said, no such question *was raised* for our consideration."

Ansbro *v.* United States, 159 U. S., 697, FULLER, Ch. J.:

"*A case may be said to involve the construction or application of the Constitution of the United States when a* TITLE, RIGHT, privilege or immunity IS CLAIMED *under that instrument.*"

(I, 22.) The Bill, after referring to the judgment in Amherst *v.* Ritch, reads thus:

"And that the same is fraudulent, contrary to the law of the land and beyond the jurisdiction of said Court;

"And in violation of complainants' rights to due process of law, secured to them by the Fourteenth Amendment to the Constitution of the United States ;

"And contrary to equity and good conscience."

The final decree of Judge LACOMBE reads thus : (IV, 782) :

"The complainants and cross-complainant having objected to the introduction in evidence of the record thereof, having moved to strike it from the record herein, and to ignore and disregard said judgment, *on the ground that the State of New York has by said judgment as an adjudication of the matters herein, each, all, or any of them, deprived them and each of them of property without due process of law, and has denied to them and each of them, the equal protection of the law,* whereby said judgment as such adjudication, is null and void, and such complainants having in their original bill, prayed that said judgment should be treated as null and void for said reasons."

The certificate of Judge LACOMBE reads thus (IV, 840) :

"The foregoing appeal is hereby allowed October 15, 1890, for the review *of the questions set forth in the Assignments of Error* filed herewith *as well of* jurisdiction AS OTHERWISE.

E. HENRY LACOMBE,
U. S. Circuit Judge."

The certificate upon appeal from this Cross Bill (IV, 852) contains the same words.

The requirements of the decisions of this Court would seem therefore to have been met.

Were said Decrees Obtained by Fraud on the Court?

Said Circuit Court having then had jurisdiction in this suit of general equity cognizance, where there is the requisite *diversity* of citizenship, and the required *amount* is involved ; to inquire if said decrees *were obtained by fraud* ; and,—if it found that they were,—to then require those who had procured said decrees, and by them had obtained possession of said estate, to deliver it to its owners.

Were the Probate Decrees Obtained by Fraud?

The next question is, WERE said decrees *obtained by* fraud, practised *upon the said Court?*

Was this Cross-Complainant prevented

By said fiduciaries and by said twenty colleges, which combined with them to get possession of said residue, in the words of this Court, U. S. *v.* Throckmorton (*supra*), prevented from presenting ALL of her case in the Court ?

Although, at the Probate Contest, said fiduciaries swore that *they* owned said residue *absolutely ;*

if the *only* proof we had that they did *not* so own it, was said three *memoranda*,

and the *talk* with Ritch and Vaughan which *had been* then divulged;

and if they claimed that said memoranda did *not* affect their said OWNERSHIP;

A doubtful question of law arose, perhaps, whether said memoranda and talks *did* affect said bequest of said residue;

and we settled with them, without trying said question of law,——

it might be claimed that said settlement should stand.

If their said oaths, and said memoranda and talks were ALL that THEY three then knew, affecting our title to said residue,—there might be reason in their position.

But, on the other hand, if *they knew* of OTHER facts;

which would raise *doubt* whether the law as laid down in the case of Keleman, 126 N. Y. , applied;

and if the expression of Mr. Fayerweather's wish as to said residue did not fall far enough short of a command, to add to the doubt; and our suspicions and belief to the contrary could be established by proofs of said OTHER facts—a different case would be presented.

What was to be Proved?

What was to be *Proved?*

The testator's disposition of said residue.

So far as it was made known by *testamentary* papers, we knew what he had done.

By *memoranda?*

We knew what SAID THREE memoranda said.

By talks?

We knew *only so much* of these as Ritch and Vaughan *had told us.*

This ENDED our knowledge upon the subject.

If there were MORE memoranda,—we did NOT know it.

Or their *contents.*

If there were *more* talks,—we did *not* know what was said.

Said three men, to whom they were entrusted, DISCLOSED NO OTHERS. To THIS day, we have NEVER learned that anyone ELSE knew of them! Unless it was their counsel.

They told us that they had consulted together early in the probate-contest to see *what* memoranda they had which *might* affect the disposition of said residue.

As a result of said consultation, they showed us *these three* memoranda *only.*

Why were we not justified, under *such* circumstances *in believing* that *said* three memoranda *were the only ones* they had, or knew of, which *might* affect the disposition of said residue?

So far as we *then* knew, they were reputable men, standing well in the community; their leading counsel being an eminent lawyer, a recognized leader of the Bar of the second city of the world; a president of hospitals, and favoraby known in various useful and honorable lines.

We had the testator's personal assurance that he knew that Mr. Bulkley was an honest man."

Why were We Not to Believe These Men?

Were we not to BELIEVE these men?

When *they told us* that *they* owned that residue ABSOLUTELY? When their said counsel took *the same* position and pressed it energetically and unhesitatingly; when there was serious doubt if *said three* disclosed memoranda in ANY way *prevented* their ownership *from being absolute.*

Vaughan has told us of his talk with Mr. Fayerweather between ten and twelve o'clock upon the *morning* of November 15th, 1890, the day upon which the latter died; occurring BUT ABOUT TWO HOURS BEFORE said last codicil was signed."

"Groping in the Dark."

"BEFORE he testified to that talk, Ex-Pro-
"bate Judge Rollins, counsel for the present
"complainants, in argument before the Surro-
"gate, said:

"(VI, 620.)—What I say is this. WE ARE
"GROPING HERE IN THE DARK, so far as I
"now can see; except from Mr. Parson's
"promises, which *await* fulfillment."

"What did Vaughan AFTER that, at the
"Surrogate's proceeding, or at any time before
"said Probate decrees were made, testify took
"place at this important MORNING talk, BE-
"FORE said last codicil was executed?

"(VI, 678.) He said that the testator said
"that Mrs. Beardsley was to have $100,000
"more.

"(679). That Vaughan wrote a paper to "that effect, and the testator signed it; said "paper acting as authority for Vaughan, "Myrick and Beardsley, retaining the $175,150 "of presents—the *only* written authority for "it—by the way, yet disclosed.

"P. 711. That Vaughan had the order "that morning *to burn* the codicil of Novem- "ber 11, 1890.

"P. 714. That VAUGHAN talked about *busi- "ness* matters almost exclusively, yet which "were *not* firm matters.

"P. 715. That VAUGHAN suggested enlarg- "ing the bequests to complainants herein "from $20,000 each to $50,000 each.

"That the testator *declined to* do so.

"That it was *Vaughan's own* idea, *not* Mr. "Fayerweather's, to prepare the letter ad- "dressed to him and Myrick, empowering "them to pay said $100,000 to Mrs. Beardsley.

"That Mr. Fayerweather WAS IN BED, and "Vaughan at his side. That he signed said "order for $100,000 to Mrs. Beardsley between "ten and eleven A. M.

"That they talked about the sums to be "given TO EMPLOYES.

"P. 72.

"P. 725. That 'AFTER the execution of the "codicil, the ONLY remark I CAN RECALL, was "to PUT OUR HEADS TOGETHER and FIND "PLACES to PUT the MONEY.'

(P. 724.) "Q. Was there anything *more "specific* than *that;* have you stated ALL that "*he* stated on that subject? A. I believe I "have said ALL. There was *nothing more*

"*specific* than that; and I believe that I have "said ALL that he said upon the subject, *that* "*is*—AFTER *the signing*."

Where Was There a Hint at Disposition of the Residue?

In this talk as to said $100,000; as to burning the codicil of the 11th; as to increasing the bequest to these complainants; as to giving more to employes;

Is there *any* reference the *residuary bequest* of $3,600,000?

Any *suggestion* that *it* was *referred to?*

That he wanted it to go to *any* recipients, other than to *said three fiduciaries?*

If so—*upon what page* does it occur?

I have looked with care. I do *not* find *any*.

"I *do* find that 'AFTER the execution of the "codicil * * * the only remark I can re- "call is to put our heads together and find "*places* to put the money' ".

How Proof of the Trust was Suppressed on the Trustees Before obtaining Withdrawal of Objections to Probate and Obtaining the Releases, for the Widows and Next-of-Kin.

It will be observed that the witness says that this was "The ONLY remark", he could recall.

And that the money was to go to "*places*".

But *where* do you find here any hint or suggestion that places meant *institutions?*

It was *his own* counsel, Mr. Parsons, who was examining him.

His last words on the subject are: "*That is,* AFTER *the signing*".

These words are *suggestive.*

As you now have ALL the proofs at the Probate Contest of what Vaughan says that Mr. Fayerweather said, at this *morning* talk, *before* the codicil was signed and at the *afternoon* talk, "AFTER the signing";

It at once occurs, why was he not asked—if that was all *after* the signing—if it was *also* ALL BEFORE the signing?

This was *not* asked.

Upon this evidence then as to what was said, these two talks, drawn out by Mr. Parsons himself—which is the *only* evidence of what was *then* said, for Vaughan is the *only* living witness of it—were not the widow and next-of-kin and their counsel justified *in believing* that that *was* ALL that was said, at these *two* interviews?

Had Your Honors been in their place, would you not have felt justified in *so* believing?

And *in acting upon* that belief?

Would you, for a moment have thought *of* MISTRUSTING *these men,* who, so far as you knew, were *of excellent repute,* whom the testator had apparently selected from his entire acquaintance to be *trustees* of his life's great savings?

In which part then of this testimony of Vaughan's do you find *any* intimation that said residue did *not* belong to said three fiduciaries *absolutely?*

What *words* say so? What *word* says so?
What words *imply* so?
Do you find *anything* here of any *other* memorandum, made that *morning*—save said order for the $100,000 for Mrs. Beardsley?
And said memorandum as to the employes?

Here, then, what had Messrs. Coudert and Rollins to go by?

The bequest to said three *fiduciaries*, by said last codicil of this entire residue, *absolute right, upon the face of the codicil;*
Said three *memoranda*, made *years before*,
also certain *talks*, *not* connected with *this* codicil;
An order and a memorandum made upon this morning, but *not* referring to said *residue;*

A Codicil Made by Vaughan's Direction While Mr. Fayerweather Was Dying.

The position taken by reputable counsel;
And, to be sure, a remarkable fact, this codicil, made *immediately after* all these instructions *which yet did not embody or refer to one of them;*

All—Practically—That It Did Was to Give Vaughan About $1,200,000 Absolutely.

But the *only* thing it *did* was to change Vaughan himself from the recipient of but $60,000, his commissions as executor, to be absolute owner of about $1,200,000, besides said $60,000.

With His Last Words He Ordered Vaughan Out of the House.

How is it that he *did not say anything about any instruction* or suggestion from the testator—*not* about a few dollars more or less to some obscure employes——

but as to *an outright gift of over a million dollars* to a man not related to him, and who swears that he owed said testator at that time $500,000; and the *uncontradicted* testimony as to whom, is that, by the *last* coherent words he spoke, while gasping for breath, and *about to die*, were: "VAUGHAN, GO OUT OF THE ROOM AND OUT OF THE HOUSE!".

But was not that ALL that was said at said interviews as to said residue?

Do we claim that anything ELSE was said or done there, which DOES affect the ownership of said residuary estate?

Your Honors will judge.

Why Should They Not Believe Mr. Parsons?

Is there *any reason* why Messrs. Coudert and Rollins should *not* believe *that that* WAS ALL then said done?

Why should they longer be "*groping* in the *dark*"?

Why they should *not believe* that Mr. Parsons *would not claim* that said bequest *was* absolute if he knew of any proof that it was not so?

Would *you* not feel *bound to* believe him?

Would common honesty require him, if he had

any proof which *might* raise grave *doubts* whether one dollar even of said residuary bequest *was* absolute—to promptly DISCLOSE ALL of such proof?

THAT being done—if probate was THEN granted; if we released THEM—at ten cents on the dollar; Would we have ground to ask Your Honors to look into this transaction now?

What Vaughn did Not tell Messrs. Coudert and Rollins.

But WAS that done?

Did not Vaughan tell ALL that was said in that *morning* talk, *as to the disposition of this residue;* upon the strength of which *he had* this codicil drawn;

that suddenly, upon his *own* sworn statement, *unsupported by any other* proof, *raised his interest* in this estate from $60,000 of commissions to *twenty-one times that amount?*

Nearly all the things that he *did* divulge, as to what was said in this *morning* talk *are of comparatively trifling account*, a bagatelle, besides the entire $3,500,000, and the question *who owned* IT.

Is it possible that when he was testifying as to that talk, of scarcely three months before; Is it possible that he did *not* remember if *anything* was said as to what should be done with the vast *residue?*

When he brought out so clearly that that was *all* that he remembered as to what was said "*After* the codicil was executed, does it not look as if, *even then*, he was carefully trying *to distinguish* between *what* was so said *after*, and what was said

before the execution of said codicil, and to *avoid* swearing that it was NOT all that was said to him by the testator *before* this death-bed codicil was executed?

Have your Honors seen here, in this testimony, which is all the testimony *that Messrs. Coudert and Rollins had to go by—all* that was given by *any* witness, for Vaughan was the *only* witness, living, to *what* took place in that *morning* talk between him and the testator;

have you seen here *any* reference to any *other* memorandum made at that morning talk, *other than* the *two* just specified, namely, the one as to the $100,000 to Mrs. Beardsley, and that as to changing the legacies as to the employees?

Why, WAS there any OTHER?

Let Mr. Parsons himself aid you upon this point.

Parsons Confessed that He Suppressed the Tell-Tale Memorandum until After the Withdrawals and Releases.

And what does he say?

At the hearing before the Referee to take the account in March, 1897, after the remittitur had come down from the New York Court of Appeals, Mr. Parsons having offered himself, and been sworn as a witness,

I *cross examined* him as follows:

"(II, 248) Q. Were you not aware, at the

" time of that deed of gift, that *besides* the will " and codicils you refer to there were certain " *memoranda* signed by Mr. Fayerweather, " and in the possession of one of these execu- " tors? * * * A. I know that *one that I* " *regarded as of the* GREATEST *importance was* " *in my possession.*

" Q. *What* one was *that?* A. There was a " memorandum, made by Mr. Vaughan *in sub-* " *stantially the last interview* he had with Mr. " Fayerweather, *in which Mr. Fayerweather,* " according to my understanding—*told him* " that, so far as he, Mr. Fayerweather, *had* any " wishes on the subject, THIS RESIDUARY ES- " TATE *was to go* to OTHER institutions.

" Q. You mean by *other* institutions, *other* " *than those* on the *face* of the will and codi- " cils? A. *I mean exactly that.* * * *

P. 250. " I will answer one branch of the in- " quiry further, that is this. That from the " beginning of my connection with the case " down to now, I have advised my clients that " it was right that ALL CONCERNED should " have *the possession* of ALL evidence, written " or oral, WHICH COULD BEAR UPON THE DETER- " MINATION OF ANY OF THE QUESTIONS, *which* " *are an issue* concerning Mr. Fayerweather's " *estate.*

" The very so-called memoranda, which *were* " put in evidence before the Surrogate, were " put in evidence as the result of a conference " between Mr. Ritch and myself, following a " conference with the executors.

" In which I took the position that, it was " *not* for THEM to determine what should be " done *with this estate.* It was not for *them*

"to decide whether this will should, or should "not be *proved*. *That* was for *the Court* to "determine, when ALL of the evidence that "ANYBODY desired, bearing upon the subject "*should be before* the Court.

"Much of that evidence could have been "*withheld*.

"Much of the evidence *which has been be-* "*fore the Court* in the Amherst College suit, "could have been *withheld*. But the position "which the *counsel for* the executors took at "the start, and to which they have adhered to "the end, was, that *their relation to this con-* "*troversy*, WAS OF A TRUST CHARACTER.

"THAT IT WAS FOR THEM TO GIVE the Court "ALL the facts, WHICH THEY KNEW, for the "Court to decide.

"And I defy anybody to point to anything "from the beginning to the end of this litiga- "tion, in the way of action, on the part of "counsel, which is *adverse to* that view.

P. 251. "Q. The memorandum which you "have described here, was it in relation to the "*codicil* made, on the *dying-day* of Mr. Fayer- "weather?

"A. I have testified to that. The memoran- "dum about OTHER institutions, to which I "have referred, *was* made *on the day of* the "execution of the codicil, *by which these* (3) "*gentlemen take*.

"* * * Q. You have said here to-day that "ALL data NECESSARY to reach a JUST conclu- "clusion, was (were) then laid before these "gentlemen, and I ask you to find *any* time, "*any* evidence, *any* place, *any* proof, that "*that fact was* EVER *laid before* THEM.

"A. I presume that the paper to which "reference is made is the memorandum, as to "which I gave full testimony yesterday. A "memorandum that, SO FAR AS MR. FAYER- "WEATHER HAD WISHES, *the residuary estate* "*was to go to* OTHER institutions.

"*I attended with that* memorandum *my-* "*self*—REGARDING IT AS OF IMPORTANCE—in "Court on the Probate Trial, ready to produce "it, IF IT WERE CALLED FOR by Mr. Coudert.

"There was some inquiry in reference to the "envelope, according to my present recollec- "tion, HAVING SOME BEARING ON THE SUBJECT. "I have forgotten what it was.

"MR. COUDERT DID NOT ASK FOR the paper; "AND I RETAINED IT IN MY POSSESSION.

"P. 252. Q. Mr. Coudert *did not* at *that* "time KNOW *there was* ANY SUCH PAPER? A. "I do not know.

"Q. *Did* you TELL him so? A. I don't "know why I SHOULD tell him so.

"Q. Did you purposely CONCEAL IT from "from him? A. I concealed *nothing*. I pro- "duced *everything* THAT WAS ASKED FOR.

"Q. Did you *produce* THAT paper at that "Probate Court; or produce it *to Mr. Coudert* "*or Mr. Rollins* at ANY time BEFORE the "*agreement for this release* was signed? A. "I HAD ALL the memoranda on this probate "contest; and as they were CALLED FOR pro- "duced them. *That* was NOT CALLED FOR, and "IT WAS RETAINED.

Parsons Declines to Answer.

"Q. Please to state *how* Mr. Coudert *could* "KNOW that *such* a paper WAS IN EXISTENCE,

" or Mr. Rollins? A. He could have ASKED " if there were OTHER memoranda. I TAKE " THAT BACK—I DECLINE TO ANSWER.

" Q. Did you TELL him *there* WERE ANY " OTHER memoranda? A. I have already an- " swered as fully as I can.

" Q. Did you *try to conceal* that OTHER " memorandum from him? A. *I tried to* con- " ceal *nothing.*

" Q. DID you *conceal it* from him? A. I " did *not.*

" Q. Did you SHOW it to him? A. *I did not* " *volunteer to* show it to him.

" Q. Did you LET HIM KNOW it existed? A. " I had no *conversation* that I recall on the " subject.

" Q. Did you, *in writing* Mr. Coudert, let " him or Mr. Rollins KNOW OF ITS EXISTENCE? " A. I have no recollection of having had *any* " correspondence with him on the subject of " that memorandum, or any memorandum, ex- " cept as I have already stated.

" Q. Did you LET THEM KNOW OF the CON- " VERSATION that Mr. Vaughan testified to as " taking place between him and Mr. Fayer- " weather on the MORNING of the dying day; " in substance, that OTHER institutions—as to " the residue—WOULD HAVE TO BE FOUND, and " the money WOULD HAVE TO BE given to " THEM?

" *Will you* swear you EVER *let Mr. Coudert* " *or Mr. Rollins* LET THEM KNOW *anything* " about *that;* and that *they* EVER *knew any-* " *thing* about *that* until TWO YEARS *after* you " got *those* RELEASES? A. *I do not recall,* but " this I do know, I was employed to obtain the

" probate of these papers, offered for probate " as the will and codicils of Mr. Fayerweather. " Mr. Coudert was the opposing lawyer. *I* " *recognized the right of* Mr. Coudert *to any* " information *in the possession of* these gen- " tlemen, *for which* Mr. Coudert ASKED. *But* " *have yet to learn that*, if Mr. Coudert " thought that evidence, of which I knew, " *would be favorable to this side of the contro-* " *versy*, I being on the *other* side, my duty to " my clients required that I should endeavor to " hurt *their* case.

" I UNDERSTAND THAT MY PROFESSIONAL " DUTY WAS JUST THE REVERSE OF THAT. Re- " member, this was a question of the *probate* " contest.

" Q. You were familiar at that time with " the duty of a trustee, IN OBTAINING A RE- " LEASE from the beneficiaries, TO DISCLOSE " the FULLEST information ; EVERYTHING *that* " *he knew* THAT WOULD AID that *cestui que* " *trust* in reaching a determination of how " much property belonged to it ; and what his " duties (*rights*) were in it, were you not? A. " I think I shall decline to acquiesce in the " statement, which is put to me in the form of " a question.

" Q. You were not familiar with that prin- " ciple, were you ? A. I think I shall decline " to dignify by the name of principle, the " proposition which the counsel has just em- " braced in his inquiry.

" Q. Did you, or did you not know, *when* " *these releases were obtained*, that the execu- " tors *had not*, and *you* as *their counsel*, HAD " NOT *disclosed* ALL the information THAT YOU

"HAD in your possession, bearing upon the "*amount of* their property; OR THE INTEREST "of the widow or nieces in that property? A. "I did not.

"* * * Q. Did you *produce* that ('Oa') "at the Probate trial? A. The probate had "nothing to do with any such inquiry. BUT I "DID HAVE THAT PAPER, on the CHANCE THAT "it might be ASKED FOR; and was ready to "produce it.

"Q. You had it there, on a chance that it "might be asked for, and you were ready to "produce it. Did you give *any* information "*to the widow and nieces or to their counsel*, "or *either* of them, *that there* WAS *such a* "*paper* IN EXISTENCE? A. I THINK IT IS EX- "TREMELY UNLIKELY that I should do so.

"Q. *Did* you? A. *I have no recollection*, "further than I have testified."

Mr. Coudert Did Ask for this Very Envelope ("Oa") that was then in Parsons' Pocket.

It will be observed that Mr. Parsons thus testified that this envelope marked "Oa" was NOT ASKED for.

That he said that "Mr. Coudert did NOT ASK FOR the paper; and I retained it in my possession".

(VI, p. 687.) "*Mr. Coudert.*—WHERE IS THE EN- "VELOPE OF THIS?

"*Mr. Arnoux.*—Mr. Ritch says that is correct. "It WAS the 14th.

"*Mr. Parsons.*—It WAS the Friday."

(.) The inquiry that brought this out, was as to the *date* of Ritch's letter of November 14th, 1890, to Mr. Fayerweather, which Vaughan carried from Ritch, but says that he never delivered.

It will thus be seen whether or not Mr. Coudert DID "ASK FOR" this envelope, which Mr. Parsons swears *he would have produced*, HAD he BEEN ASKED FOR IT.

It will also be noted in passing, that both Arnoux and Parsons suddenly sprang to the rescue; and promptly conceded THE DATE OF the postmark upon the envelope. As the inquiry at the moment was only as to this DATE; and as Mr. Coudert, from the testimony just given, did NOT *know of the existence of* these memoranda, upon this *envelope;*

Had Parsons Disclosed "Oa",—What would have been the Effect?

The question will at once occur whether either Arnoux or Parsons *meant to let him know of this memorandum.*

Or whether they were trying *to conceal* it from him.

If they had *nothing* to *conceal*, why did they not SHOW him the envelope, *when he asked for* it?

Suppose that they HAD done so. Would he, or would he not, have seen *these memoranda* upon it?

Mr. Coudert needs no introduction in this Court. He was a high-minded and enlightened gentle-

man, of unusual ability and prominence in the profession, and always candid and outspoken.

Is there any need of asking:

When *he* saw these memoranda, telling about *the part of* this very *morning* talk which Vaughan DID divulge at the probate contest;

Which were most of them of almost no importance;

when he saw the words "OTHER institutions for benefit",

right at a time when—as his colleague makes it so clear—*they were both* GROPING IN THE DARK", when the one thing he was in that court room to find out—if he in any way could, was—who *did* own that great residue?

Is it difficult to say whether Mr. Coudert would not *at once* have asked Vaughan, *what* this sentence *meant?*

If he did not write it at *that* interview?

How he *came to* write it *then?*

What Mr. Fayerweather *had said about it*, and if he did not write it *at Mr. Fayerweather's dictation.*

It will not be denied that the *first* that the nieces and their counsel *ever* knew of this memorandum, was *nearly three entire years after* they *had released*, withdrawn their objections to probate, and had at ten cents on the dollar.

That the widow *died* without *ever* having known of its existence.

And that *her release* was obtained from her *without* her *ever* having *that* knowledge.

It will not be denied that the *first* that we, the

present counsel for the complainants and cross-complainant, or the twenty colleges, *ever* knew of it was, *when Mr. Parsons himself asked* Vaughan that which caused him to *disclose* it upon the trial of Amherst, etc., *et al. v.* Ritch, etc., *et als.*, *nearly three years after* said withdrawal and releases were obtained from these ladies.

Look a step further.

Had Mr. Coudert, and had ex-Judge Rollins – perhaps the ablest Surrogate New York State has ever known in any County, save possibly Surrogate Bradford—had he seen *this memorandum*;

had they, by it, *learned* that, when these three *fiduciaries* each swore that *they* owned said residuary estate of $3,500,000 ABSOLUTELY, this memorandum made it irresistibly clear that they *did* NOT *own one dollar of it;*

Had *they then* known just *what* this single line said hidden in Parsons' pocket, *at the very time when it might do the greatest mischief*, a paper, which *he himself* recognized the value of, when he voluntarily *swore* that he regarded it "of THE GREATEST IMPORTANCE".

Is it probable that these eminent lawyers would have allowed their clients *to withdraw* their *objections* to that probate contest,

and to sell out their great rights in a vast estate, at ten cents on the dollar? Each of which ten cents was their own money all the time?

Why the Proof was not All Laid before the Surrogate.

Your Honors will ask why we did not lay before the Surrogate the proofs we now offer as to the *factum* of the codicil made when the testator was

dying; as to the *influence* forcing him to do what he was too weak to resist; as to *his incompetency* to *intelligently* take part in any transaction calling for the exercise of memory and judgment, to say nothing of one involving the ownership *of millions of dollars.*

The answer is simple. *There was* No *probate contest.*

There was only *a part of a* contest.

The situation had become *dangerous.* The draftsman of the burned codicil had *refused to disclose its contents;* the Surrogate had given him a significant hint that he could choose between such disclosure *and confinement* (VI, 789).

Then the deed of "gift" was suddenly sprung; and these ladies notified that what they had been told all along by these three fiduciaries, that they—said ladies—did not own a dollar of, *they owned* EVERY *dollar of, less* the small personal bequests. The proof that they *did* own it having been thus *suppressed* by these very men who *alone* possessed that *proof; and by their counsel,* who has just *sworn* that *he* had a part of it in his pocket; and did not produce because it was not "*asked for*"; when the record shows that it WAS directly and distinctly "*asked for*". Having thus seen it deeded *all* away by this same deed of gift; and they offered their choice between ten cents on the dollar of what they were told was *other* people's money; when *in fact each one of* the ten cents *was all the time their own;* when the widow of this multi-millionaire, stricken down with a mortal disease—so enfeebled that, as she states in her power of attorney, she was *not capable of* understanding *what she was doing;*

when in the midst of probably the greatest grief she had ever known, in the loss of her husband, who in every document before your Honors, as occasion arose, invariably refers to her as "my beloved wife"—whose devotion to her for nearly forty years of their married life is never questioned;

when this same lady, looking to men whom her husband had selected, as *honorable* and *trustworthy friends*, found *them threatening to eat up* his *entire* estate *in litigation;* and, *carrying* out their threat that *she* would *not* get *a dollar of it by depriving her* for nearly *four whole months* of *enough money out of these six millions dollars* to get *food enough to put in her* mouth and *to pay her servants*, does it take long to see why this starving widow, with one foot already in the grave, withdrew from this contest?

And to say whether *objections to probate withdrawn* under *such* circumstances, and agreements to release obtained under *such* circumstances, from a helpless and aged invalid in such a plight, should stand?

Parsons Produces Oa, but nearly Three Years too Late. Vaughan now tells the Untold Part of the Morning Tale.

(V, 452.) The record of the trial of Amherst *v.* Ritch reads thus:

"By Mr. Parsons—1 (To Vaughan).

"Q. Will you look at the paper which I "hand you and tell me what that is? A. That "is *the envelope* which enclosed a letter,

" which has been produced here. It is Mr.
" Ritch's letter to Miss Joyce.

" Q. Did you see that letter; and if so, when
" *first?* A. Saturday *morning*—November
" 15th—at about ten.

" Q. Does that *envelope* contain the Post
" Office stamp which shows when it was depos-
" ited in the Post Office? A. Yes, sir.

" Q. When? A. New York—November
" 14th—five P. M.

" Q. And does it also show when it *was re-*
" *ceived* at the station of delivery? (reading)
" 'H, 11-14.90, 6 P. M., N. Y.'

" Q. Will you look at the letter signed
" Thomas G. Ritch, and addressed My dear
' Miss Joyce, bearing date November 13th—
" 1890, and which has been marked Exhibit O;
" and say whether that is the letter which was
" enclosed *in this envelope?*

" Q. Did you receive anything from her, at
" *that* time (10 A. M., Nov. 15), and if so, *what?*
" A. I received this letter (Exhibit O) *and the*
" *envelope.*

" Mr. Parsons.—We offer the envelope in
" evidence. The envelope is marked Exhibit
" '*Oa*' of this date.

" (V, 458.) Q. Prior to that time (Feb. 24,
" 91) had there been, between Mr. Fayer-
" weather and yourself *conversations* on the
" subject of any which he might have in respect
" to the distribution of his residuary estate?
" *Had* there been? A. Yes, sir.

" Q. Was there such a conversation on the
" *afternoon* of November 15th, and *after* the
" execution of the codicil of that date? A.
" Yes, sir.

"Q. Were you examined in the Surrogate's "contest by Messrs. Coudert and Rollins upon "the subject of THAT conversation; and in "answer to them, did you state what oc- "curred? A. Yes, sir. * * *

"Q. Were you asked in the Surrogate's con- "test by Messrs. Coudert and Rollins, "this question? '*After* the execution of the "codical and after Messrs Browning and "Grout had gone out, did Mr. Fayerweather "say anything to you upon the subject of the "execution of the codicil?'

"Objection having been made to this, the "record continues thus:

"Mr. Parsons:—I wish to show that it has "been known to the parties in that proceeding "*since* THAT time, what occurred between Mr. "Fayerweather and himself; and that they "have recognized the importance of it BY AB- "STAINING FROM EXAMINING Mr. Vaughan "as a witness; to show that they "have known, since February, 1891, that *here* "was the gentleman who *knew* what Mr. "Fayerweather's WISHES WERE; AND WHO "KNEW THEY WERE IN ACCORDANCE WITH "THE DEED OF GIFT.

"(V, 460.) Q. From what, if from anything, "or from anyone, *did you take down* what is "written *by you* in pencil on *the back of Ex- "hibit Oa;* that being *the envelope* which con- "tained Mr. Ritch's letter to Miss Joyce? Did "you take it down from what anyone said? "A. From what was said between Mr. Fayer- "weather, THAT MORNING.

"Q. Do those pencil memoranda, made by "you on the back of that *envelope*, Exhibit Oa,

"*correctly* show things *said by Mr. Fayer-*
"*weather* to you in *that* interview? A. *Yes, sir.*
"Mr. Parsons.—'Now *we offer* the memor-
"anda in evidence.'
"(V. 463.) Q. In this interview did you re-
"ceive from Mr. Fayerweather *instructions*
"with reference to the *last* codicil; with refer-
"ence to the preparation of the codicil *of the*
"*fifteenth of November*; and did you go down
"to Messrs. Arnoux, Ritch & Woodford's
"office with those instructions AFTER that in-
"terview? A. Yes, sir."

Vaughan—Years AFTER Getting the Releases Divulges the MORNING Talk.

"Q. *During the interview* was anything said
"between Mr. Fayerweather and yourself *with*
"*respect to* WHAT WAS TO BE DONE WITH THE
"RESIDUE *of the estate*; assuming that such a
"codicil as the last codicil, *was* executed by
"him? A. Mr. Fayerweather referred to his
"competency in selecting institutions for
"benefit.
"Q. State *what* he said? A. Stated that he
"was not very well fitted for such purpose.
"But that he had used *his best endeavors*, and
"obtained the best advice he could get. And
"then went on and said THAT THERE WOULD
"HAVE TO BE OTHERS FOUND TO WHOM THE
"REST OF THE MONEY SHOULD BE GIVEN.
"Q. In saying that he had used his best judg-
"ment, of information with reference to cer-
"tain institutions, *what* institutions did he

" refer to? State *fully* what he said on that " subject? A. He said that he had selected, " by the best advice that he could get, such in- " stitutions as he thought would be proper to " be benefited.

" *By the Court:*

" Q. *Is that* ALL *of the conversation that you* " *remember?* A. No, sir. He referred to——

" *By Mr. Parsons:*

" Q. What did he *say*? A. He referred to " further selections that would have to be made. " * * * HE STATED THAT FURTHER WOULD " HAVE TO BE MADE.

" *By the Court:*

" Q. *Have you stated* ALL *that was said* on " *that* subject, Mr. Vaughan? A. We were " talking for two hours almost. Mr. Fayer- " weather referred to * * * Mr. Fayer- " weather told me then what he had done with " reference to selecting those institutions— " and *stated that* OTHER INSTITUTIONS WOULD " HAVE TO BE SELECTED, AND DID NOT REFER " TO ANY PARTICULAR INSTITUTIONS THAT " SHOULD BE BY NAME, but indicated.

" (V, 465.) *By Mr. Parsons.*—Q. *How* did " he indicate it? A. *Said* THAT THE *sur-* " *plus* OF THE MONEY *would have to be* GIVEN " TO OTHER INSTITUTIONS.

" *By Mr. James.*— Q. *What kind of* insti- " tutions? A. THERE WAS *no* SPECIAL KIND " of institutions referred to; it was left.

" *By the Court.*—Have you stated ALL now? " A. That is ALL I recollect on THAT subject."

Vaughan's Entire Surrogate Testimony, put in by Mr. Root to Show that he did Not Tell the Surrogate the Suppressed Part of the Morning Talk.

"(V. 748.)

"Mr. Root, of counsel for plaintiff, called "Jabez Holmes, Jr., of counsel for Dartmouth "College, who, being sworn, testified as fol- "lows:

"Q. Have you examined the testimony of "Mr. Vaughan before the Surrogate, upon the "contents of Mr. Fayerweather's will, as is "contained in this volume, to which counsel "has been referring you, and from which I "have just been reading? A. I have.

"Q. Did you examine it to ascertain whether "there was ANY reference in that testimony to "the envelope which has been marked Exhibit "Oa here; and which is said to have con- "tained the letter of Mr. Ritch to Miss "Joyce? A. I did.

"Q. Was there a reference made to that en- "velope? A. There was.

"*Mr. Root.*—I read the reference from page "687:

"The letter appears at page 686, and that is "followed by this:

"That is signed by Mr. Ritch. It is signed "Thomas G. Ritch; IT is conceded all to be "in Mr. Ritch's handwriting?

"*Mr. Parsons.*—Yes.

"Q. Mr. Ritch states in this letter of

"the 13th that he has had two long talks "with you; is that true? A. I think that date "is a mistake.

"Q. What do you think was the date? A. "I think the letter must have been written on "the 14th.

"*Mr. Coudert.*—WHERE IS THE ENVELOPE "OF THIS?

"*Mr. Arnoux.*—Mr. Ritch says that is cor- "rect. It was the 14th.

"*Mr. Parsons.*—It was the Friday.

"Q. Is that *the only* reference made in the "course of Mr. Vaughan's testimony to the "envelope of the Joyce letter?

"(V, 751.) *Mr. Root.*— * * * I offer ALL "the testimony of Henry B. Vaughan, con- "tained in this book, regarding which coun- "sel has stipulated, taken before the Surro- "gate on the 25th and 26th days of February, "and March 2, 1891, *that being the* ENTIRE *tes- "timony of Mr. Vaughan before the Surro- "gate,* NOT as evidence of the truth of the facts "testified to; BUT FOR THE PURPOSE of show- "ing that Mr. Vaughan DID NOT testify to "any such remark by Mr. Fayerweather on "the afternoon of the 15th of November, "1890, as he testified to here."

Mr. Root probably meant *morning* instead of afternoon.

But whether it is a misprint or not, the remark is equally true of the *morning* testimony.

The closest scrutiny of Vaughan's testimony before the Surrogate, as we have already shown, brings out that while he told of the Mrs. Beards-

ley—the employee money, and other *small* matters, spoken of in the *morning* interview, *he scrupulously avoided even one word of testimony or reference to anything said by Mr. Fayerweather in that morning interview*, as to what *he* wanted done *with his residuary estate.*

Was That ALL of the Morning Talk?

Your Honors *now* see if anything ELSE WAS said or done at this important MORNING interview.

You see what was said *by Mr. Fayerweather*, as to the *disposition* he wished made of this large *residue.*

But was not *this* proof in ANY way brought out *at the Surrogate's trial?*

If Mr. Parsons brought it out three years later in the trial of Amherst *v.* Ritch, then *why* did not HE bring it out at the Probate contest? Whether it WAS brought out at the Surrogate's contests, interested Mr. Root and the twenty colleges so deeply that, as we have just seen, he called Mr. Holmes, who swore, in substance, that he could find no reference to it in that testimony. And then he put in the ENTIRE record of Vaughan's Probate testimony.

It thus appears that *no syllable of proof was offered by Parsons and Vaughan before the Surrogate* of what Vaughan later swore that the testator *told Vaughan* was his wish as to the disposition of his entire residuary estate.

That Parsons *knew it* so well, and its significance that he swears that he recognized that it was of the greatest importance, and in the most practical way *endorsed* his statement by *keeping* the only

documentary proof of that interview—namely, Exhibit "Oa"—safely *in his own pocket;* the counsel for these ladies *never dreaming then what that pocket thus contained.*

But *why* did he voluntarily bring it out at the trial before Justice Truax, yet suppress it at the Probate contest?

At the Truax or Amherst *v.* Ritch trial in 1894 the releases, as already seen, were already nearly *three years* old.

The widow had been *dead* for almost two years.

New claimants, unheard of at the Probate contest, were in court, namely, the twenty colleges, asserting that THEY owned this entire residuary estate, in addition to the $2,100,000 given to them by specific bequests in the will.

The Deed of "Gift" in Danger.

The deed of "gift" was *now* on trial.

$3,500,000 were *now* at stake.

The power *to make* that *deed*, and, by it, *to move this property*, was hotly *contested.*

The burden was upon the donees, named in that deed of gift, and upon their donors, namely, said three *fiduciaries—to establish their title* by a preponderence, of competent, affirmative proof.

The bold claim of said three *fiduciaries* that they owned said residue *absolutely*, to do with as *they* pleased—with *no reason given why* they thus each, suddenly became a millionaire—or added a million to their previous store—was improbable and *incredible* at the start; was even *more* so *now;* and would arouse *universal* suspicion.

The hurry *to* "*deed*" it all away *before* the Probate Contest was over ;

And its potent effect in bringing the widow and next-of-kin to terms, to whom said fiduciaries and Parsons took care to promptly *get word* that it *was* thus all deeded away, did *not* support the claim, of these three *fiduciaries* that *they* owned it *absolutely* ;——

Plausible and meritorious as such *giving it up* by them might seem ; it was also all the time observed, that, although they three had *had possession of* the estate, for already about *three years*, THEY HAD NEVER PAID OVER A DOLLAR OF IT TO ANY INSTITUTION, under the deed of gift—*with no reason given why*, if it *belonged to* said institutions, it had been *kept from them so long*.

It was also noted that the fact that Ritch *had been driven out of* the service of the testator ;

That he *refused* to ever see him again ;

That he had said that *the sight of* him *would kill him ;*

That he never DID see him again—stood *uncontradicted*.

The fact that, with his last *gasp*—he *drove* Vaughan out of his presence and *out of the house—also uncontradicted*—did *not aid* the claim that but two hours before he had made Vaughan a "present" of $1,200,000—*absolutely*, to do as he pleased with.

It was too great a strain upon ordinary credulity. How far Vaughan and Parsons were justified in making a "*Gift*" of—*not* theirs—but *another*

man's money to four Parsons' institutions, *of* over $1,500,000, Ritch thus testifies (V, 387):

> "Q. Did Mr. Fayerweather ever mention to you a wish that you should give to Union College any portion of his residuary estate? A. No, sir.
>
> * * * Q. Or *to the University of the City of New York?* A. *No*, sir.
>
> * * * P. 387. Q. Or *to Cooper Union?* A. *No.*
>
> * * * Q. Did Mr. Fayerweather ever say to you that, out of his residuary estate, the benefaction to the *Woman's Hospital* should be *increased over and above* the $10,000 which he left to it in the eighth clause of his will? A. *No*, sir."

Nor was the Probate contest the proper *forum* for establishing *a trust.*

While that was the very *purpose of* the suit of Amherst *vs.* Ritch——

To *meet* the assault of the 20 colleges ;

And the charge that,—from the evidence then known, the entire *residuary* estate, was to be divided between said 20 Colleges share and share alike, the same as by the will and the first codicil,—Parsons saw that he had the testimony of but a *single* witness.

The *improbable* story of a man so *profoundly interested*,—who had admitted *under oath*, in the Surrogate's contest, that he had made a *false statement to Ritch*, and *knowing* that it was false had *allowed it to stand ;* and Ritch to be *misled* by it.

The Parsons Institutions Might Lose their "Gifts".

But, now that Vaughan had parted with his alleged interest in this residue by the Deed of "Gift", the situation *had shifted.*

It was no longer *Vaughan*, Ritch, and Bulkley, who must be protected personally, to the amount of *a million dollars* each.

There was a *larger* stake. One that came nearer *home.* THIS time, *it was the million and a half* for the four *Parsons* institutions,—the four, to but *one* of which the testator had given *anything at all*,—and, to *that* one, *his very smallest bequest* to *any* eleemosynary institution, namely—of $10-000.

But, noble munificence with ANOTHER man's money, Parsons's and that of the other *three*—if any of them had ever before *heard of* the Woman's-Hospital,—which is not proved—foresaw a rude shock coming.

He well knew—if he was to be *paid by* said four institutions for his princely gift,—or rather for *this* princely gift.—If so then his FEES were in danger. Could they not well afford to pay *such* a benefactor anything he might ask? If they ratably approached the $30,000—he got for ten days' work of five hours each,—*or six hundred dollars an hour*—in the Probate contest, in getting the will and codicils through, *only by obtaining the withdrawal of* the objections of the widow and next-of-kin, *in the peculiar manner detailed in this record*,—it might prove a highly *unprofitable* transaction *for him personally.*

He therefore did not hesitate——

He personally called upon Vaughan, who lay

bare *the very proof* which had, in all these years, been so successfully *concealed*, part of it, at the critical moment—as we have seen,—*in Parsons's own pocket in the Probate contest.*

Parsons' Deep Interest.

It was thus for *Parsons'* interests *more than* for that of any other living man, *to support* that deed of "*gift*".

He would look and feel very flat at all future meetings of his hospitals, if these bounteous "gifts" proved to be bubbles.

So he brought up his reserves——

He divulges now, the very part which *he* had *kept hidden* before.

When getting their *objections withdrawn*, and concealing from the widow and next-of-kin the proof of their *rights* and their *interests* in this property;

and procuring from them *releases* of it, at ten cents on the dollar, and so getting probate through,—HALF of the truth was enough.

Ten OF THEIR OWN cents, always remember, by *telling* them that they did NOT own one of them;

When, had ALL of the truth been told them, *they would have at once known, and had* their own during all the past fourteen years, to wit, the *entire* one hundred per cent. of this residuary estate, less what they have had, and the small personal bequest to others.

To be sure Lord Eldon had said in 1818, *Walker*

v. *Symonds*, 3 Swanston, 72,
that "HE WHO, undertaking to give information, GIVES BUT HALF INFORMATION, IN THE DOCTRINE OF THIS COURT, *conceals*."
But that would be forgotten at this late day.
So now,—out came the OTHER half.

Also the precious memorandum "Oa"—which to be sure, HAD BEEN in Court—at the Probate contest;
But—in *Parsons*' pocket.

To be sure also he *did* say there—that if Mr. Coudert had "*asked for*" it, he would have shown it to him.

But, when the proof stands *uncontradicted* that Mr. Coudert DID then and there *ask* "Where is *the envelope* of this?"
Instead of producing it—as he swore that he *would have* done, Parsons was *one of the first to distract attention from it*, by promptly conceding a part—an unimportant part—of what it said upon it. Just enough to kill suspicion and to KEEP "Oa" in his pocket.
And Parsons did NOT produce it—when Mr. Coudert "*asked for* it".

So vigorously did he press it, so effectively did he use it, that upon it, and upon the *fifth* codicil—made while Mr. Fayerweather *was dying* rests the ONLY title to this great *residue* claimed by said three *fiduciaries* from that day to this.

A *Bad Outlook for the Twenty Colleges.*
Not an *inviting* title *for the twenty colleges.*

It ENDED *their* hopes for sharing in this residue, save the six of them which were *donees* under the deed of "gift".

It *expressly disclosed* that it was NOT for the 20. That *they* had *had their* share in the *bequests* to them of $2,100,000 by specific legacies,—more, by the way, than any *other* man *ever* gave to *said 20 colleges*, since John Harvard gave Harvard $3,500, and Elihu Yale gave Yale $4,000; and by doing so, have made their own names secure for centuries.

But this proof showed that the residue was for OTHER institutions, *not* for the *twenty* at all.

And *why not?*

Was it not quite as reasonable, as giving it all to the 20 colleges, which had already fared so well?

When Mr. Fayerweather, in Memorandum No. 3 of March 22nd, 1889, expressly said "Having made inquiries with regard to Hampton and Lincoln Universities, *it is my judgment* that the bequests (of $100,000 each) to them *should be withheld*" "I think the bequest to Cornell University (of $200,000) should *not* exceed $100,000".

When he thus *called in* $300,000 out of said $2,100,000 and *cut off* Lincoln and Hampton *entirely;* and cut Cornell *down* by *one-half*,

did he mean, in the *same* breath, *don't do anything of the kind;* but *give* to *each of them*, one-twentieth of my residue of $3,500,000, namely, $100,000 *more?*

As Judge Choate well says, in his brief for the donees :

How They Got Around the Danger.

In this plight, how did the 20 colleges get around the danger?

They saw that a trust to *other* institutions,—*unnamed*,—*unclassed*,—was *the* trust, under which the testator *had* given this residue.

Their counsel knew also, that, under the Tilden and other decisions, *such* a trust *was void* for *indefiniteness*.

That, as Judge Choate said, in their brief:

(P. 41.) "If there was, in this case a trust for institutions, *then the whole residue of the estate*, being held upon a trust *too indefinite to be enforced*, and not being intended for the benefit *of the legatees*, WAS CHARGED WITH A TRUST *ex maleficio* IN FAVOR OF THE WIDOW AND NEXT-OF-KIN, and passed to the donees under the deed of gift, *by the releases* executed by the widow and next-of-kin. And the same is true as to each third as to which such trust is found."

And he adds this significant remark,

"That *such* a trust IS CREATED in the case supposed, *in favor of the next-of-kin, appears to be the necessary result of the decision in the O'Hara case.*"

In effect, that the residue would *then* belong *to the widow and next-of-kin*, as if Mr. Fayerweather had died *intestate*.

Something then must be done.

The Colleges Attack Vaughan's Credibility.

So they attacked *the credibility of* Vaughan,—the *only* witness thus far, of anything that might jeopardize their claim to the residue, *provided always* the *widow* and *next-of-kin* could be kept out of the way.

Hence, if they could get Vaughan also out of the way, they would be all right.

So they *did* attack his credibility.

And they DIDN'T.

When THEIR OX was being gored, Vaughan was a *perjurer*.

And what he said as to the *morning* talk, was absolutely *false*.

But if, for any reason, the fourth or "*burned*" codicil, should be proved to be the *true last* testamentary act of said testator;

Then, what Vaughan said about *that;* he who *had it drawn*, and had kept it in his pocket; and whose lawyer, Butler, was muzzled; and would not, and did not, tell its contents; and it was "*burned*";

And Vaughan managed, to be sure, to only remember *a part* of it;

But that *that* part gave the residue *to the 20 colleges;*

THEN a more *truthful* man than Vaughan, it would be *difficult* to find.

So vigorous and persuasive was their assault upon his credibility, when it thus suited *their* purpose, that they induced the Trial Judge to take *their* view.

Also the Judge of the State Court of Appeals, who wrote the opinion;

And who, after expressly stating that that Tribunal had *no* authority to deal with the facts, plunged into them, and stated twelve reasons why the Trial Court—Justice Truax—*was justified* in *not* believing Vaughan under oath.

And, *by thus eliminating* this dangerous witness, the 20 colleges obtained this property.

The present question is, had the whole truth been told what would have been the effect as to the withdrawals and releases?

But, the *present* question is NOT whether Vaughan was truthful or untruthful.

IT IS—If at the Probate Contest Vaughan and Parsons had told *the whole of* what Parsons thus asked, and got him to divulge at the *Truax* trial;

Instead of *only* telling Messrs. Coudert and Rollins that these *three fiduciaries owned* said residue ABSOLUTELY.

Had he sworn *there* as he *did* before Justice Truax, that

BEFORE this codicil was drawn, by which said three got the legal title to this residuary estate, the owner of it had told him that, as to it, *other* institutions *would have to be found*, and the money *would have to be given to them.*

In which disposition, thus known to him, he (Vaughan) *acquiesced;*

And *allowed* the testator *to believe* that it would go to *such* institutions ;

Had he told *this* to Messrs. Coudert and Rollins ;

Had Parsons' pocket *opened* in the *Probate* contest, as it *did* in the *Truax ;*

And had the tell-tale memorandum "Oa" seen the light again ;

And when Mr. Coudert asked "Where is *the envelope* to this ?" had he been SHOWN the envelope ?

Instead of, as Judge Rollins expressly stated, any longer "*Groping* in the *dark*";

Had they known *all ;*

Had Vaughan and Parsons, in short, *told* the *morning* talk, as well as the afternoon, and offered "Oa";

And thus complied with the rule as laid down by the Court of Appeals in Cowee *v.* Cornell, hereafter.

Had the *whole* TRUTH thus been told, instead of *selected portions, would Messrs. Coudert and Rollins have allowed the contest to cease ?*

Have allowed their clients to receive in all, *but ten cents on the dollar ? Their* own ten cents ?

Always upon the *express representation* by said three fiduciaries that said ladies did *not* own *a dollar of* said residue ;

And always, when *the fact was*, that *they* owned *every dollar of* said residue ; which, of course, included the ten per cent. which these ladies were thus told was being *presented* to them ;

When nothing now stood in the way, in short, of their *getting* their entire heritage ?

If Vaughan and Parsons had done *this*, had they told THE WHOLE truth ;

If they *had* done so,—could Messrs. Coudert and Rollins have longer held up their heads in any civilized community, which knew that *they* had done *such* a thing ?

Many times in this record has Parsons himself especially insisted what honest and able men these two gentlemen were.

The reason for which will be seen presently.

To every word of which, as already seen, we cheerfully assent.

But how *could* men of *that* character and capacity have *allowed* these helpless ladies *to be content with but ten per cent.* of an estate, delivered to them, under the pretext that it was a *present*, and that they did *not* own *any* of it ;

when all the time it was No present at all ; and *they owned the whole hundred per cent.*; and when these and their distinguished counsel, were aware of that fact ?

No Claim to the Residue at the Probate Contest by the Twenty Colleges.

It should not be lost sight of that there was *no* claim at the Probate Contest, *by the 20 colleges.*

That *they* did not *dream* that *they* had *any such* claim.

That never came out until, in the suit of Reynolds *v.* Ritch, they saw that they *might* have rights in said residue.

That, *if our releases stood* ;

As they knew nothing yet of the *morning* talk, *They*, *Twenty*, from all they then knew, *ought to be* the *owners* of this residue.

The Law as to Buying Withdrawals of Objections to Probate—And Releases.

Parsons tries to shield himself behind the fact that trust or no trust was not an issue before the Surrogate.

That will or no will; probate or no probate, was all that could be gone into in that Court.

He says, Remember, this was a question of the *Probate* contest. That is so.

Probate or no probate WAS the issue there.

But HOW that probate *was being obtained*,—was of high importance there.

If the ONLY way that he got it through was by inducing the contestants *to withdraw* their objections; even *he* will not urge that, *if that withdrawal was obtained by suppression of proof*, AND BY DIRECT MISREPRESENTATION, by *his* clients—who *knew* it;

And who *knew* that these ladies, and their counsel, did NOT *know* it;

Which truth, HAD the latter *known it, would have at once established that these ladies*, and NOT said *fiduciaries*, OWNED this residue;——

Even *he* will not ask this Court to hold that a contract *to withdraw objections to probate* gotten in THAT way, is valid and binding.

When that *withdrawal* and that *ending*,—with

the aid of the inevitable *releases*, could ALONE open ANY way for his clients or for their donees,—to lay any valid claim to the residuary estate,—*was* there any contest at all ?

The law as to such a contract, obtained by suppression of material facts by one having superior knowledge of the matter ; by misrepresentation or by both, has been too long settled, and is too familiar, to justify anyone in believing that our Courts will TOLERATE such a transaction.

In Cowee *v.* Cornell, 75 N. Y., 99, the Court said :

> " It may be stated as universally true, that " fraud vitiates *all* contracts. But, as a general " thing, it is not presumed, but must be " proved, by the party seeking to relieve him- " self from an obligation on that ground.
>
> " *Whenever, however*, the relations between " the contracting parties appear to *be of such* " *a character*, as to render it certain *that they* " DO NOT DEAL ON TERMS OF EQUALITY ; But " that, either on the *one* side *from superior* " *knowledge of the matter*, derived from a " *fiduciary* relation ; *or from over-mastering* " *influence ;*
>
> " or, on the other, *from weakness depend-* " *ence or trust justifiably reposed, unfair ad-* " *vantage* in a transaction is rendered PROBA- " BLE ;
>
> " THEN the burden *is shifted ;*
>
> " *The transaction is presumed* VOID ;
>
> " And it is incumbent upon the *stronger* " party to show affirmatively that NO decep- " tion was practiced ; NO undue influence was

"used; and that ALL was fair, open, volun-
"tary, and well understood. *This* doctrine *is*
"*well settled.*"

Have these Fiduciaries so shown?

WERE the parties to this contract of withdrawal of these objections to probate, and to obtaining these releases, ON TERMS OF EQUALITY?

Which side had the "SUPERIOR *knowledge of* the matter";
These ladies, or these three *fiduciaries?*

Was or was not that knowledge derived from a FIDUCIARY relation? Would they have ever HEARD OF it even, but for the fact of their being *executors* and *trustees* named in these testamentary papers?

WHICH side had THE PROPERTY; *the* "*over-mastering influence*" and the ability *to use* that influence to carry out its wishes—*these three men, in control of* six million dollars, THREATENING, if necessary, to spend this *entire* estate in litigation, before *the widow* should receive *one* dollar of it;
or that same widow for nearly four whole months KEPT BY THEM FROM receiving ONE DOLLAR of it; forced to *borrow* money to obtain FOOD with which TO KEEP ALIVE; a fatal disease fastened upon her vitals, in her old age;

WHICH side would *you* say *had*, as the Court puts it, "OVERMASTERING influence"? Or "*weakness, dependence*", or "*trust justifiably reposed*"?

Should the Widow and Kin Not have Believed Mr. Parsons?

Will Mr. Parsons say that these ladies and Messrs. Coudert and Rollins were NOT justified *in reposing confidence in* HIS OWN *words*, and HIS actions; which so materially assisted his clients IN KEEPING *these ladies*, and their counsel, FROM KNOWING ANYTHING *about the very facts* which said *fiduciaries* and *said Parsons all the time knew;* and also all the time *knew* that, in a transaction with these ladies, taking away from them *all* their *rights* in this estate, it was the uppermost duty of these four men to give her the FULLEST and CLEAREST *information* in the ENTIRE matter of which they four knew, or of which they had any idea.

Has he forgotten the law as to *such* work?

Kerr on Fraud and Mistakes,

"P. 81. However negligent the party may "have been to whom the incorrect statement "has been made, yet THAT IS A MATTER AF- "FORDING NO GROUND OF DEFENSE TO THE "OTHER. NO MAN CAN COMPLAIN THAT "ANOTHER HAS RELIED TOO IMPLICITLY ON THE "TRUTH OF WHAT HE HIMSELF STATED (5 cases). "The effect of what would be otherwise NO- "TICED may be destroyed not only by actual "misrepresentation, but BY *anything* CALCU- "LATED TO DECEIVE OR EVEN TO LULL SUS- "PICION UPON A PARTICULAR POINT" (cites 6 cases).

How was it, when THEY FOUR *all the time knew all about this morning* talk, they *first* obtained

her withdrawal of objections; and then her *release* of all claims against this estate; which estate they were dividing up nearly two-thirds of among those *they* chose;

How was it that they DID NOT DIVULGE THIS knowledge UNTIL NEARLY THREE WHOLE YEARS AFTER THEY HAD GOTTEN HER WITHDRAWAL and RELEASE; and nearly two whole years AFTER she WAS DEAD?

How COULD SHE have *known her rights* and been in a position to make any contract under SUCH circumstances?

If she and Mr. Coudert BELIEVED said three fiduciaries and their counsel Parsons,

WHEREIN was not *that belief* under *these* circumstances "Trust *justifiably* reposed"?

Will Mr. Parsons say it was *not?*

If in *such* a case as the Court says "The transaction is presumed *void;*

Then, why does not its *other* conclusion follow that it is

INCUMBENT UPON THE STRONGER PARTY TO SHOW affimatively, that NO *deception* was practiced; NO *undue influence* was used; and that ALL was fair, OPEN (Not hid in Parsons' pocket), Voluntary, AND WELL UNDERSTOOD?

If what was done in getting these *withdrawals* and these *releases* was *not* practicing *deception*—just what *would* be?

Is it difficult to see if the widow of Daniel B. Fayerweather was not overreached by these four men in an unconscionable bargain?

What WAS this contract ?

If you will WITHDRAW your objections ;

If you will RELEASE all claim upon this estate, this residue, WE will "GIVE" you ten per cent. of this residue.

Did These Fiduciaries Keep Their Contract ?

Has *this* contract BEEN KEPT between trustees and their beneficiary ; what *would* be an instance of that sort ?

Have they ever GIVEN them ONE CENT OF IT ?

Can I *give* away YOUR property ?

Before I can *give* away property I must OWN it or have from the owner or the Court THE RIGHT TO give it away.

From the first page to the last of this record—find ONE suggestion of said three men, or of Parsons, that they were NOT GIVING this ten per cent.

That they AS EXECUTORS OR TRUSTEES were paying over—NOT *theirs*, but THE TESTATOR'S money, to LEGATEES, who OWNED IT, and WERE ENTITLED TO possession of it.

Are these the words and acts of executors and trustees or of *owners ?*

EVERY word and act of THEIRS IS EXACTLY THE OTHER WAY.

READ THEIR OWN WORDS, drawn presumably by Parsons himself, and signed with their own names.

(III, 505 foot.) "WHEREAS, we, the undersigned, Justus L. Bulkley, Thomas G. Ritch and Henry

B. Vaughan, RESIDUARY DEVISEES AND LEGATEES in and by said deed reserved the power to make and retained the right to assent to any "enlargement of" the widow's annuity.

"Now, know all men by these presents; that under the power, authority and rights reserved by the deed of gift aforesaid.

(FIRST). WE hereby GIVE

1.—To the wife of the said Daniel B. Fayerweather, deceased, THE SUM OF $225,000 * * *

and *we* also agree to execute to her *a deed of* the lot in Woodlawn Cemetery intended for the interment of the remains of Mr. Fayerweather.

Had they, *at the probate contest*, as they *did* at *the Truax trial*, DISCLOSED that THE ENTIRE PROOF they had which JUSTIFIED them in giving away any of Mr. Fayerweather's money was this morning talk, Oa, and the fifth codicil made while he was dying;

Why would not Messrs. Coudert and Rollins have seen that these three men HAD NO RIGHT WHATEVER to make that deed of Mr. Fayerweather's money;

As every Court that has ever dealt with that deed of "gift" HAS HELD that they had no right to?

Have seen that, conceding every word of the morning talk to be true;

Said three men DID NOT OWN ONE CENT OF THIS RESIDUE *that* they had *any* right to *give* away.

The Law as to Purchases by Fiduciaries from their Beneficiaries.

The law has something to say about this kind of work of these three *fiduciaries*.

A significant fact connected with this transaction perhaps justifies inviting the especial attention of your Honors, to this deed of "Gift".

In its last clause (IV, *203*) occur the following words

"We execute this instrument, recognizing that there is pending a contest in proceedings for the Probate of Mr. Fayerweather's will, *and recognizing further* that if such contest shall *not* prevail *a question may be made* ABOUT OUR LEGAL RIGHTS AS DEVISEES AND LEGATEES.

We assume *no* responsibility for the result of such contest; or of any such question; for the acts or omissions of each other; or for the amount of, OR TITLE TO ANY OF SAID RESIDUARY ESTATE."

With the express admission thus made by these three fiduciaries over their own signatures, in a paper principally drawn by Parsons, that they *did not know what* trust was impressed upon said residue; why were they in such unseemly haste to give it away *before* they knew whether it was *theirs* to give?

How came they to be giving away WHAT THEY DID NOT KNOW IF THEY OWNED?

Trustees in Doubt as to the Trust Should Do What?

When trustees are IN DOUBT just *what* trust is impressed upon property, in their hands;

WHERE do they get *the right to become donors of it?*

To "*give*" it away, among recipients *of their own* selecting?

With it, to *buy off* the *real* OWLERS at ten cents on the dollar?

The law of New York on this point has long been settled.

It stands undisturbed to-day.

One of your Honors has thus laid down the rule, in O'Conner *v.* Gifford, *117*, N. Y. PECKHAM, J.:

> "Trustees are favorites with Courts of equity.
> " And *for that very reason* they can at *all*
> " times, *apply to the Court* to be *informed* as
> " to a duty; or as to the *validity of the trust*,
> " which they had undertaken to carry out.
> " Having this right, where *their title to* the
> " fund, *depends upon the validity of* the
> " trust, as evidenced upon the face of the in-
> " strument; it is not too much to say to a trustee
> " under *such* circumstances, IF THERE BE THE
> " LEAST POSSIBLE DOUBT OF the *validity of*
> " your title; *bring the parties* who might be
> " interested in that question, *into Court*; and
> " *there* have a *judicial* determination of its
> " validity; and that determination *will be a*
> " *perfect protection for all your acts.* If a
> " trustee, in a case involving ANY doubt,
> " chooses to go on, and carry out the provisions
> " of the trust; HE HAS BUT HIMSELF to blame
> " in case *of disaster*"

That the trust need not be "evidence *upon the face of* the instrument". Judge PECKHAM continues thus:

"In Smith *v.* Dressed (35 Beav., 378 [1 Eq. "Cas.], 651) the trust deed was void, and the "person otherwise entitled to the property "brought an action to recover it from the trus- "tee, who asked for a decree, permitting him "to retain the costs and expenses, he had in "good faith incurred, prior to the commence- "ment of the action.

"Lord ROMILLY, Master of the Rolls, denied "the motion; and said, the trustees having "been appointed under a trust deed which was "invalid, he should have known the fact before "he proceeded. That, although on the face of "the deed it was alleged that three-fourths of "the creditors had consented, such was not the "fact, and inquiry would have shown it. "That a trustee was entitled to have his costs, "executing trusts existing and valid, and which "he has undertaken to perform, but if the "trusts are invalid he has no trust to execute, "and he is not competent to execute any.

"And as such trusts were invalid the trustee "had no duty to perform, and he ought to have "paid the money over at once. This is said "of a case *where the trust deed was not even* "*void on its face*, but because of an *extrinsic* "fact, *viz.:* the failure of the necessary num- "ber of creditors to consent to it."

A Self-Constituted Court of Equity.

Suppose that, instead of thus constituting *themselves* a Court of Equity;

And deciding that *they* owned the property;

And giving it to donees of *their* choice;

When they thus, in writing, *confessed that* they did *not know who* owned it;

Suppose at *that* time, they had done, what the law thus points out that *they should have done;* in this case indeed, not involving any doubt; for the proof which they thus suppressed was conclusive;

Suppose that they had frankly *told* ALL parties, ALL that was said at this morning talk.

Instead of only that *part of* it, which affected but one hundred to $100,000 of that residue;

Suppose *that they had told every word* that affected the *entire* $3,500,000 of the residue;

And had SHOWN TO THEM "Oa"—instead of *concealing* it;

Had thus shown why they were *in doubt* as to the trust;

Which they meantime, in their deed of gift, *gave away* to their own donees;

And had *told all* parties, that, as said decision points out, they would.

"Apply *to the Court*, to *be informed as to* their duty;

Or as to the *validity of* the trust", which they had undertaken to carry out;

Where instead of "*the least possible doubt of* the validity of their title";

As every Court since, has had no difficulty whatever in deciding that they had no title at all;

And had such Court found that this trust for OTHER institutions, *was*, as Judge CHOATE says, *void for indefiniteness;*

Hence, as to *one-half of* the net estate, Mr. Fayerweather had died *intestate;*

And said net one-half *belonged to the widow and next-of-kin*, less what they and other personal legatees had had of it;

Why would not THAT *have been exactly the right course to have taken?*

At *small* expense—with no great nest of lawyers, eating into the estate ;

(Your Honors have had a sample in Arnoux $50,000, and Parsons $30,000, in only *the first of* their fourteen years at this estate.)

Why did Parsons and Ritch Disregard the Law?

But why did Parsons and Ritch, each of them a lawyer of over 30 years' experience, ten at the New York Bar ;

Why did they thus deliberately *disregard* the law?

You have observed in passing,—Parsons' explanation.

When the situation was brought home to him,—until he saw that it seriously *demanded* explanation ; he offered this

I recognize *the right of* Mr. Coudert to *any* information, in the possession of these gentlemen, FOR WHICH MR. COUDERT ASKED.

But have yet to learn, that, if Mr. Coudert thought that evidence *of which I knew*, would be favorable to *his* side of the controversy, I being on the *other* side ;

My duty to my clients required that I should endeavor to *hurt* their case.

I understand that my professional duty WAS JUST THE REVERSE OF THAT. Remember this was a question of the probate contest !

Is the Law as to Disclosure by Attorneys—as stated by Mr. Parsons—Sound?

Is the Law as to Disclosure by Attorneys—as stated by Mr. Parsons—SOUND?

But is *this* position *tenable*? Is it sound?

Does it *comply with the law?*

With the requirements *of equity?*

How does he *limit* Mr. Coudert's right to obtain information from him only to such information as Mr. Coudert *asked for?*

And if he is *right* in that; when Mr. Coudert ASKED, "*Where is the envelope of this?*"

And the envelope was, at that time, "*in the possession of* these gentlemen."

Indeed *in Parsons' own pocket*;

Why did *he* not *produce it* to Mr. Coudert?

Go a step farther.

He rests Mr. Coudert's right to the information upon his *asking for* it.

Any thing that he *knew about*, he might be *expected to ask for.*

But, a thing he *never* knew of;

Which was *carefully concealed from him;* and it was *not meant* that he *should know about*;

How could he be expected *to ask for that?*

Why does not Parsons' rule sift down to this?

That if he *could keep Mr. Coudert from knowing* that there *was any such* paper *in existence*;

Or from *asking for it*;

Then he was under *no* obligation *to disclose it to him.*

Had they heeded the law, as laid down by the Court, that

> "It is not too much to say to a trustee, under "such circumstances, if there be THE LEAST "POSSIBLE doubt of the validity of your title, "bring the parties who might be interested in "that question into Court;
>
> "And there have a judicial determination "of its validity; and that determination WILL "BE A PERFECT PROTECTION FOR ALL YOUR "ACTS";

Had they so brought in the parties; and had they *had* such determination;

why would the owners of this property have been kept in doubt *all these fourteen years;*

And probably the true owners have been kept *out of it* during *all this time?*

Why is not the last sentence of the decision applicable to-day *to these three fiduciaries?*

And to Parsons, their guide, who, instead of *showing them* this decision; and saying to them,—There is your sailing chart;

There is *the law*;

There lies *your duty;*

By taking *that* route, you and I are guaranteed, as the Court says, "*Perfect protection*";

Instead of doing *this, why has he entangled them* step after year after year, until now, *in conduct which is indefensible?*

In a case thus, not only "Involving ANY doubt; but their position in which, was so *full of* doubt that they felt called upon to *express it* in their deed of gift";

Now, when the day of reckoning *has* come;

Why is not the *last* sentence of this decision *exactly applicable* to these three fiduciaries?

Where it says:

> "If a trustee in a case involving ANY doubt,
> "chooses to go on, and carry out the pro-
> "visions of the trust,—HE HAS BUT HIMSELF
> "TO BLAME IN CASE OF DISASTER."

Why has not each of these men exact and full knowledge now of where to lay the blame *for this disaster?*

Look for a little at Mr. Parsons' notion as to a lawyer's duty *not to* disclose the truth to cestuis from whom his clients are buying,

1. Probate of the testamentary papers which alone put them in possession and control of a great estate in which he knows—for he has in his own pocket the proof—and he knows they do not know it;

That they are profoundly interested;

2. In buying from them—under such circumstances withdrawals of their objections to said probate.

3. In buying from them general releases—contracts *uberrimæ fidei*—contracts calling for the fullest and completest disclosures and fair treatment known to the law,

Need a Lawyer for a Trustee, in Obtaining a Release from the Cestui, Disclose only so much as his Adversary has heard of?

Just where does he find the rule that all that a

lawyer need disclose to an adversary, is only as to a matter, of which he has, in some way, ALREADY HEARD?

When all is honorable and right, *that* rule applies.

But does it, where there is *dis*honorable work going on?

Where a client is perpetrating *a fraud* upon an adversary;

Both by suppressing from him proof of facts of which the former alone knows;

And which, if disclosed, would show the other that he has rights and interests in the property, of which without it, he has *no* proof:

As to which he has now *no* information;

And by directly *mis*representing under oath, that *he* owns what his proof, which he is thus concealing, shows that *not* he, but the *other* owns;

By which *suppression* and *misrepresentation*, the former obtains the property;

Will Mr. Parsons lay before this Court, *one* decision of *any* tribunal, any where, which says that a lawyer, knowing that such work is going on by his client, and all about it;

And where institutions in which *he* is interested will profit more than any one else by the transaction;

If the fraud is successfully *concealed* from the very ones, *who ought to* know *all* about it;

And who *would* know all about it, if they were *honestly* dealt with, by the men in whom they had *reason* to trust;

Will he point out *even one* decision, which holds that the lawyer *can share in* the *suppression*, in

the *mis*representation, in *all* branches of the fraud;

And *yet* that BECAUSE HE IS A LAWYER, of the guilty party, he need *not* disclose any thing that *he* knows, which would expose them, thwart their schemes, and bring the wrongdoers to justice?

Shall Professional Confidence Shield Fraud?

Since *when* did the law turn the protection of professional confidence into a SHIELD OF fraud?

The shield of professional confidence, into *a sword?*

Was *that* what that law was made for?

Is *that* what the Court meant in Russell *v.* Jackson, 9 Hare, 392, where by Vice-Chancellor TURNER it said:

"Where a solicitor *is party to a fraud*, NO privilege attaches to the communication *with him* upon the subject.

Because the contriving of a fraud IS NO PART OF HIS DUTY AS SOLICITOR.

And I think it can as little be said, that it is a part of the duty of a solicitor, as to the means of *evading* the law."

Make *what* Parsons *says the law*, and WHAT fraud could not be easily carried through, when all that you need is that the one who does the fraudulent work must be a LAWYER?

That HE will be guaranteed IMMUNITY, while all LAYMEN doing the same work, must go to State's prison?

Why should he, who *is intrusted with the proof of fraud*, and who, *by hiding that proof*, makes that fraud *win*, expect to be aided BY THE COURTS in perfecting the success of the fraud?

It will be time enough to meet so novel—so dangerous—a doctrine, when ONE decision comes, showing its existence, if it *ever does* come.

An Attorney's Duty of Disclosure.

Where does he find such law *as that*? The duty of an attorney in such a case has been laid down by the Courts for half a century.

Gartside *v.* Outram, L. J. Ch., Bktcy, N. S. Bal., 26, 115 Wood, V. C.

> "I think the plaintiffs are bound to answer "the interrogatories.
>
> "The equity upon which the bill is founded, "is a perfectly plain and simple one, recog- "nized by a number of authorities and most "salutary to be enforced. By which, any "person, standing in the confidential relation "of a clerk or servant, is prohibited, subject "to certain exceptions, from disclosing any "part of the transactions of which he thus "acquires knowledge.
>
> "But there *are exceptions to* this confidence; "or perhaps rather only nominally, and not "really, exceptions.
>
> "*The true doctrine is*, THAT THERE IS NO "CONFIDENCE AS TO THE DISCLOSURE OF "INIQUITY.
>
> "You *cannot* make me the confidant of a "crime or fraud, *and be entitled to close up* "*my lips* upon any secret which you have the

"audacity to disclose to me, *relating to any* "*fraudulent intention upon your part.*

"Such A CONFIDENCE CANNOT EXIST. * * *

"115. As regards the question before Courts "of Justice, when the question has been "whether a witness ought to disclose that "which has been committed to him; I think "the authorities largely *preponderate for al-* "*lowing* NO SUCH PROTECTION.

"Even if one of the most confidential rela- "tions—that between *attorney* and client.

"Mr. Taylor refers to a case * * * in which "the point is put so ably and so clearly by "the counsel in argument, *that I adopt that* "*argument as the best expression of my own* "*opinion.*

"It was *followed* by the *decision of* the "Judge.

"The case was of considerable importance, "a State trial of Annesley *v.* The Earl of "Anglesea 17 How., State Trials, 1139), "which lasted fifteen days, before the Court "of Exchequer in Ireland, in which very sin- "gular circumstances were disclosed; and "among other things, the attorney was asked "as to certain communications between him "and the defendant, with reference to the "alleged conspiracy, for so it would appear to "to have been, upon the part of the defendant, "to prosecute a party, and obtain his convic- "tion *and execution*, if possible.

"The Counsel objected to this course of "inquiry.

"And thereupon Mr. Sergeant Tinsdale, who "argued that case on behalf of the plaintiffs, "wishing to extort the discovery, makes use

"of this argument, *which I am willing to* "*adopt* AS THE EXPRESSION OF MY OWN "OPINION.

"He says (P. 1229):

"I shall first beg leave to consider whether "an attorney may be examined to any matter "which came to his knowledge *as an attorney.*

"If he is employed as an attorney in any "*unlawful* or wicked act, *his duty* to the pub- "lic *obliges him to disclose it. No private obli-* "*gations can dispense with that universal one,* "which lies upon *every* member of society, *to* "*discover every design,* which may be found "*contrary to* the laws of the society, *to destroy* "*the public welfare.*"

"*I apprehend that* IS PERFECTLY SOUND."

In Tichborne *v.* Lussington (Shorthand Notes, P. 5211), BOVILL, C. J., said:

"It must not be understood that I give the "the slightest sanction for there being any "privilege to a client who consults an attorney "as *to the concoction,* with respect to the com- "mitting of a crime, or *fraud.* I believe the "law is, and properly is,—that if a party, "consults an attorney, and obtains advice, if "that afterwards turns out to be the communi- "cation of a crime or fraud; that party so "consulting an attorney, has *no* privilege what- "ever *to close the lips of an attorney from* "*stating the truth.*

"Indeed, if any such privilege should be "contended for, or existed, it would work most "grievous hardship upon the attorney, who, "after he had been consulted upon what sub- "sequently appeared to be a manifest crime

"and fraud—would have his lips closed—and "might place him in a very serious posi- "tion of being suspected to be *a party to* the "fraud, and without his having an opportunity "of exculpating himself.

"* * * There is *no* privilege in the case "which I have suggested of a party, consult- "ing another, a professional man,—as to what "may afterwards turn out to be a crime or "fraud; and the best mode of accomplishing "it."

In the Queen *v.* Cox & Railton L. R., 14 Q. B. Div., 170 (1884), the Court, by Sir JAMES FITZ-JAMES STEPHEN, J., said:

"The last of this series of cases to which I "shall refer, *appears to us to be directly in "point in the present case.*

"It is part of the case of Reg. *v.* Orton "(Shorthand Notes, Vol. III, P. 9381) for per- "jury.

"Orton was indicted for perjury, in denying "that he was Orton, and affirming that he was "Tichborne.

"He gave Mr. Holmes, a solicitor, instruc- "tions to prepare a will disposing of the prop- "erty, to which he said he was entitled; and "as part of the evidence against him, consisted "in the alleged resemblance of his hand- "writing to that of Orton, and its alleged differ- "ence from that of Tichborne, the *instructions "for the will*, were introduced for the purpose "of enforcing this argument.

"They were objected to, on the ground of "*professional privilege*, and the Court dealt "with the matter as follows:

"*Cockburn, C. J.*: 'We must assume *prima* "*facie*, for the purpose of the inquiry, but only "for *that* purpose,—that the purpose which "the defendant had, in seeking to obtain the "estate, which he proposed here to dispose of "by will, for which he gave instructions to Mr. "Holmes, was a *fraudulent* purpose, *for the* "*obtaining of an estate to which* he was *not* "entitled.

"THEN *the principle upon which we pro-* "*ceed is this:*

"That where *anything* is done, and *any* "communication made from a client to an "attorney with reference to a *fraudulent* pur- "pose, THIS PRIVILEGE DOES NOT EXIST.

"The FRAUDULENT CHARACTER OF THE COM- "MUNICATION TAKES AWAY THE PRIVILEGE.

"Now, here, assuming hypothetically, for the "mere purpose of the argument, that which is "the subject matter of this inquiry, which the "jury will have eventually to determine—that "the defendant *was* engaged in a fraudulent "scheme to acquire estates to which he was "not entitled;

"And gives instructions for a will, by which "will these estates—which he thus fraudu- "lently seeks to acquire—are to be disposed of.

"*And, amongst other things*, these estates— "*or portions of them*—are intended to be given "*to his attorney* and other persons who are co- "operating with him in this scheme.

"Now, in as much as this would be for the "purpose of having the effect of *stimulating* "the attorney *to more activity and earnestness* "*in assisting him to carry out this scheme*, "which we assume for the purpose, is based in

" fraud and iniquity, THEN THAT IS DEHORS
" THE PRIVILEGE.

" If he had told his attorney *before hand*
" that he was seeking to acquire estates, which
" he was not entitled to, and employed the
" attorney for the purpose—the attorney, how-
" ever innocent in one case—of course, he
" would *not be* innocent—but assuming the
" attorney knew *nothing* of the iniquity or
" wickedness of the purpose, but believed him-
" self *honestly* employed, yet if the client had
" a *dishonest* purpose in view, in the commu-
" nication he makes to his attorney, with the
" view of making the attorney the *innocent* in-
" strument of carrying out the fraud, IT DE-
" PRIVES THE COMMUNICATION OF THE PRIVI-
" LEGE.

" So I think here that if the communication
" has not, for its immediate object the carry-
" ing out of a fraud, but still *affects* the *ac-*
" *complishment* of it *by inducing the attorney*
" *to take greater care*, and to use *more dili-*
" *gence*, and to be *more careful* than *he other-*
" *wise would be in the furtherance of the*
" *thing, it still comes to the same thing.*

" Of course, in deciding such a question, we
" must, for the purpose, assume that the pur-
" pose *was* a fraudulent one, because *that* is
" the way the case is presented to us.

" Of course, we are not pronouncing any
" opinion as to the affirmative.

" We have still the inquiry involving that
" question.

" But whatever further inquiry there may be
" —I THINK IT IS ADMISSIBLE.

"Mellor, J., agreed.

"Lush, J., said:

"'I am disposed to put it on this ground; "that the law does *not* allow, under the name "of privilege *any* person *to withhold* evidence, "which is within his power, which may be "used in support of a criminal charge.'"

Just what would Mr. Parsons have told the Lord Chief Justice and his brother Judges as to his interest in the hospitals of which he was President—if his knowledge and his client's knowledge of the vital facts of the transaction had been kept successfully concealed, until the Judges had asked him for an explanation?

If they had asked him why, this is but an instance of what they were considering:

"Of *stimulating* the attorney to *more activity and earnestness*, in assisting him *to carry out* this scheme."

If the communication to him of the morning talk and entrusting to his personal care the envelope "Oa" "affects the accomplishment of * * * a fraud" upon the widow and next-of-kin:

"By inducing the attorney to take *greater* care";

"And to use *more diligence*";

"And to be *more careful* than he otherwise would be, in the furtherance of the thing."

Would he reply that he took *no more* interest in landing $1,200,000 in the coffers of the Woman's Hospital—of which he was President——

Than in seeing that it got only the petty $10,000, which is *all* that this record shows *Mr. Fayerweather* ever thought of giving it?

If he DID, how many of the Judges does he imagine *could believe him*?

Let the Press of this country lay this statement before the millions of intelligent readers, and how many of them does he suppose would accept any such statement?

Whether the Courts allow Evasion of the Law.

Whether the law against bequests of over one-half of the net estate to such institutions, can be *evaded*, in the way described, either in the testimony of Vaughan as to the morning talk;

Or in the *other* way, found by Justice Truax, that, upon the face of the will, the residue was willed *to individuals*;

Hence, was not WILLED to institutions of the prohibited class; is thus stated in the leading New York Case of Matter of O'Hara, 95 N. Y., 412, where the Court, by FINCH, J., say:

> "The Trial Judge further finds that Judge "McCue 'made *no promise*, to obtain the be- "quest or devise; and practiced no fraud'.
>
> "This finding is assailed, but unsuccessfully, "so far as it frees the legatees from a charge "of actual fraud.
>
> "In that respect, we agree that there was no "evil or selfish intention on their part.
>
> "But the finding that Judge McCue 'made "no promise to obtain the bequest or devise', "*cannot be* sustained.
>
> "If anything is rendered certain by the evi- "dence, it is that the testatrix made the ab- "solute devise and bequest, upon the sugges- "tion of a necessity therefor by Judge McCue;

"and upon the understanding that he and his "associates would faithfully and honorably "carry out her express intentions.

"If we say that McCue made *no* such prom- "ise, that he came under no such honorable "obligation; then we must say that the testa- "trix *was misled* into a false belief; upon "which, as true, she unmistakably *acted.*

"For it is not possible to doubt, that if the "legatees had said,—we will NOT promise; we "will do as *we* please; we will not be even "honorably bound *not to* take this money *for* "*ourselves;*

"The absolute bequest would *never* have "been made.

"It matters *little* that McCue did not make, "IN WORDS, a formal and express promise. "EVERYTHING THAT HE SAID, AND EVERY- "THING THAT HE DID, WAS FULL OF THAT IN- "TERPRETATION.

"When the testatrix was told that the legal "effect of the will was such, that the legatees "could divert the fund to their own use; which "was a statement of their *power;* she was told "also that she would only have their honor "and conscience on which to rely; and an- "swered that she could trust them.

"Which was an assertion of their *duty.*

"Where in such case, the legatee, EVEN BY "SILENT ACQUIESCENCE, encourages the testa- "trix to make a bequest to him, applied for "the benefit OF OTHERS;—IT HAS ALL THE "FORCE AND EFFECT OF AN EXPRESS PROMISE. "(Walgrave *v.* Tebbs, 2 K. & J., 321; Schultz's "Appeal, 80 Penn. St., 405.)

"If he does NOT mean to act in accord with

" the declared EXPECTATION, which underlies " and induces the devise ;—HE IS BOUND TO " SAY SO. For *his silent acquiescence* IS OTHER- " WISE A FRAUD.

" (Russell *v.* Jackson—10 Hare—204.)

" So far then as McCue is concerned, he " stands in the attitude of having procured, " and induced, the testatrix to make a devise " or bequest to himself and his associates, by " asserting its necessity; and promising faith- " fully to carry out the charitable purposes " for which it was made.

" And whether his associates knew or prom- " ised, or did not, makes NO difference, where " the devise is to them as joint *tenants*, and " all must get their rights through the results " accomplished *by one.* (Rowbotham *v.* Dun- " nett, L. R., 8 Ch. Div., 430; Hooker *v.* Ax- " ford, 33 Mich, 453 ; [By Cooley, J.]; Russell " *v.* Jackson, 10 Hare, 206.)

" * * * Equity acts in *such* case, not " because of a trust declared by the testator, " *but because of the fraud of the legatee.*

" For him *not to* carry out the promise, by " which alone he *procured* the devise and be- " quest, *is to perpetrate a fraud* upon the *de-* " *visor* which equity will *not* endure. The " authorities upon this point are numerous. " (Cites them.)

" The circumstances in these cases, were " varied, and sometimes peculiar; but *all of* " *them* either recognized, or enforced the *gen-* " *eral* doctrine. It has been twice applied in " our own state. (Brown *v.* Lynch, 1 Paige, " 147; Williams *v.* Fitch, 18 N. Y., 54.)

"In the last of these cases, the making of a "bequest to the plaintiff, was prevented, by "an agreement of the father, who was next-of-"kin, to hold in trust for the plaintiff.

"And the English cases were cited with ap-"proval and the trust enforced.

"All along the line of discussion, it was "steadily claimed that a plain and unambigu-"ous devise in a will, could *not* be modified, "or cut down, by *extrinsic* matter, lying in "parole, or unattested papers. And that the "statute of frauds and that of wills, excluded "the evidence.

"And all along the line, it was steadily "answered that the devise *was untouched;* "that it was *not at all* modified; that the "property *passed* under it; *but the law dealt* "*with the holder for his fraud;* and out of "the facts, *raised a trust ex maleficio instead* "*of* resting upon one as created by the testa-"tor.

"The character of the fraud, which justifies "the equitable interference, is well described "in Glass *v.* Hulbert, 102 Mass., 40.

"It was said to consist "In the attempt to "take advantage of that which has been *done* "in performance, or upon the faith of the "agreement; while *repudiating* its obligation, "under cover of the statute."

"Yet that is *not* the position of the defend-"ants here.

"By their answer, *they deny any promise* "*whatever*, made by them; *any trust* accom-"panying the request (bequest); *any agree-*"*ment* to hold for the benefit *of others;* and "*insist* that the property *is theirs*, "FOR "THEIR OWN USE AND DISPOSAL."

"Yet that is evidently intended merely as "an assertion of what they insist is their "LEGAL position; and is not meant as a re- "pudiation of their promise, or its honorable "obligation.

"And no beneficiary, claiming any such "violation of duty, or even as threatened or "intended, is before us.

"But it may happen—as it does happen here "—that all the charitable uses enjoined are "for the benefit of those incapable of taking; "OR OF A CHARACTER IN DIRECT VIOLATION "OF THE LAW OF THE STATE.

"WHAT THEN BECOMES THE DUTY OF A "COURT OF EQUITY?

"*A fraud remains*, except that it takes on "*graver* proportions, and becomes *more* certain "and inevitable.

"*The agreement* which *induced* the absolute "devise, and the fraud of a *beneficial* holding, "secured by a *contrary* promise, *still confront* "*us*.

"And what is *worse*, it does *not* need that "the absolute legatees repudiate their promise. "For, if ever so honorably willing to perform "it, they CANNOT do so, WITHOUT SETTING AT "DEFIANCE AND SECRETLY EVADING THE LAW, "AND GENERAL POLICY OF THE STATE.

"The alternative is plain, and offers *no* "chance of escape.

"If the legatees *repudiate* their obligations, "*that is a fraud* upon the *dead* woman, *who* "*acted upon the faith of their promise*.

"If they are *willing to* perform, they *cannot* "perform EXCEPT BY A FRAUD UPON THE LAW; "to which they, and the testatrix, are equally "parties.

"P. 415. In *such* a case, the fraud *remains* "and exists, identical in its character as to the "testatrix, BUT AN INJURY TO THE HEIR-AT-"LAW AND NEXT-OF-KIN, instead of an identi-"fied and capable beneficiary. And it becomes "not only a fraud against them, but a fraud "*upon the law;* since it is a declared and ad-"mitted effort TO ACCOMPLISH, BY A SECRET "TRUST, WHAT COULD NOT, ON THE FACE OF "THE WILL BE DONE AT ALL.

"If, on the ground of fraud, equity, as it "has often done, AND WILL ALWAYS DO,— "*fastens a trust ex maleficio* upon the fraud-"ulent legatee or devisee, for the protection of "named and definite beneficiary;

"No reason can be given why it should not "do the same thing, when the fraud attempted "assumes a *more serious* character BECAUSE "AIMED AT AN EVASION OF the law;

"And seeking the shelter of unauthorized "purposes.

"In such event, if equity withholds its "power, one of two things is accomplished:

"Either the legatee holds the estate BENE-"FICIALLY,—*which is a fraud* upon the *testa-"trix*, and the intended *objects of* her "bounty!

"Or the fund is devoted to *un*authorized "purposes, IN FRAUD OF THE LAW, AND OF THE "HEIRS AND NEXT-OF-KIN.

"If a trust *ex maleficio* may be fastened "upon the property, in the hands of the "fraudulent legatee in the one case—why not "also in the other?

"If in the one, the fraud grows out of *a re-"fusal* to perform,—which would be the vol-

" untary act of the legatee *repudiating* his " promise,—and so an actual fraud;

" in the other, it grows out of the *impossi-* " *bility of* performance, EXCEPT IN DEFIANCE " OF the public law,—which is legally a fraud.

" In *neither* event can the legatee honestly " hold.

" In both, either fraud triumphs, OR EQUITY " DEFEATS IT through the operation of a trust; " AND PROTECTS THOSE JUSTLY ENTITLED.

" And so are the cases. * * *

P. 416. " In Muckleston *v.* Brown (6 Ves., " 63, 65), Lord ELDON intimated that where " the devisees took, under an agreement to " hold, upon such trusts as the testator should " declare; but he *omitted to* declare *any*; " THERE WOULD BE A TRUST TO THE HEIR, " WHICH EQUITY WOULD DECREE. And added, " as to a case of EVASION of the statute, the " pointed inquiry:

" ' Is the Court to feel for individuals; and " ' not to feel for the WHOLE OT ITS OWN SYS- " ' TEM, and compel a discovery of fraud, THAT " ' GO TO THE ROOT OF its whole system?'

" In Schultz's Appeal (80 Penn. St., 405) the " plaintiff failed, solely for want of proof of " an agreement by the legatee inducing the de- " vise, and the same difficulty existed in Row- " boham *v.* Dunnett (L. R., 8 Ch., 430); and " as to three of the four tenets in common in " Tee *v.* Ferris.

" But *all* confirm *the general doctrine* as- " serted.

P. 420. " We have thus an important ques- " tion squarely presented. If equity will not " touch this devise, BY PUTTING A TRUST FOR THE

"HEIRS-AT-LAW AND NEXT-OF-KIN, upon the "fund in the hands of these legatees;—

"THE ROAD TO AN EVASION OF OUR STAT- "UTES, AND THE TEMPTATIONS OF NECESSITY "OR GREED WILL BE LEFT WIDE OPEN, while "in such cases it has been well said that the "Court should act with caution, and only upon "the clearest proof of fraud (Collins *v.* Hope, "20 Ohio, 501), yet when, as here, THE FACTS "ARE PROVED BEYOND REASONABLE QUESTION, "WE OUGHT NOT TO HESITATE.

"The testatrix *did* intend an absolute de- "vise to these legatees, on the face of the "will; but she did not intend that they should "have the resultant *beneficial* interest; and "relied upon their promise to carry its fruits "elsewhere.

"They do not refuse to perform. Although "they deny the promise, it is quite possible "that they mean to keep it. We are not au- "thorized to say or suspect, that they will *not*.

"BUT IF THEY DO, THEY MUST INEVITABLY "CARRY OUT A PLANNED AND PURPOSED "EVASION OF our statutes against perpetuities.

"* * * P. 421. While it is true, as was "said at Special Term in the very able opinion "contained in the record, that our statute does "not forbid charitable devises and bequests; "it does forbid expressly and imperatively, A "CERTAIN MANNER OF making them.

"Gifts or transfers made in *that* manner, are "prohibited, and made *void*.

"THE PRINCIPAL LEGATEE IN THIS CASE "KNEW IT;

"AND IT WAS DISTINCTLY PLANNED BETWEEN "HIM AND THE TESTATRIX THAT HER UNDER-

"STOOD AND DECLARED PURPOSE—WHICH "COULD NOT BE LAWFULLY CARRIED OUT BY A "DEVISE ON THE FACE OF THE WILL—SHOULD "BE EFFECTED BY AN ABSOLUTE DEVISE, "COUPLED WITH HIS HONORABLE OBLIGATION "to hold and appropriate the property to FOR-"BIDDEN uses.

"AN EVASION OF THE LAW WAS THE VERY "OCCASION AND OBJECT OF THE ABSOLUTE "DEVISE.

"Without that, it could not have been sug-"gested, without a fraud upon the testatrix. "For if there was no need of it; IF NO STAT-"UTE WAS TO BE AVOIDED OR FLANKED—the "very suggestion of an absolute devise was "fraudulent.

"* * * P. 422. We are not ready to con-"cede that our statute against perpetuities is "any the less sacred than the English acts of "mortmain; it may possibly be that the "evils of such EVASION are greater in the one "case than in the other; but that will not jus-"tify us in shutting our eyes to the process; OR "HOLDING THAT EQUITY STANDS HELPLESS IN "PRESENCE OF THE FRAUD. The learned "presiding Judge at the General Term while "affirming this judgment formally—that it "might more swiftly come to our Bar—sent "with it a very wise and prudent caution.

He said: "It seems clear to us THAT THE "LAW OUGHT NOT TO ENCOURAGE ARRANGE-"MENTS FOR THE DISPOSITION OF PROPERTY BY "TESTATORS, SUCH AS THIS CASE DISCLOSES."

In Wallgrave *v.* Teb (*supra*) the Vice-Chancellor said that "The duty of a devisee, under "the circumstances stated, WAS TO THROW UP "THE PROPERTY."

"ANY DEVISE OR BEQUEST OF THIS CHAR-
'ACTER IS DANGEROUS AND INDEFENSIBLE. It
"exposes testators to the suggestion of un-
"necessary difficulties, *as inducements to the*
"*artifice* of an *absolute* devise, *concealing* an
"*illegal* trust.

"*It exposes the devisee to temptation;* and
"even when he acts honestly, to severe and
"unrelenting criticism.

"IT SUBSERVES NO GOOD OR USEFUL PUR-
"POSE. IF WE SUSTAIN IT, WE ADMIT THAT
"ANY STATUTE MAY BE THUS EVADED, AND
"THAT EQUITY CAN NOT REDRESS THE WRONG."

Late Decisions as to Evasion of the Law.

That the law, thus stated, continues the same undisturbed, will be seen from the following decisions—one of them, about 60 volumes, later than the 95th New York (*supra*).

Hardly six months before Mr. Fayerweather died, an attorney had drawn a codicil,

to a will and codicil making a large number of bequests to various *charitable* institutions, which codicil reads thus:

"If for any reason, any legacy or legacies be
"left by my will, or by any codicil, either
"pecuniary or residuary, shall lapse or fail;
"or for any cause take effect in whole or in
"part; I give and bequeath the amount which
"shall lapse, fail, or not take effect, ABSO-
"LUTELY TO the persons named as my execu-
"tors.

"In the use of the same I am satisfied that
"they will follow what they believe to be my

"wishes. I impose upon them, however, no "conditions; leaving the same to them person- "ally and absolutely; and without limitation "or restriction."

In Edson *v.* Bartow, 10 App. Div., 113, the Court, by RUMSEY, J., says:

"Under all the circumstances as they are dis- "closed, it is a necessary inference, we think, "that Mr. Parsons, when he drew this will, "and attended to the execution of it, knew "what the testator's wishes were;

"That he knew they were those which had "just been expressed; *and that he gave her to* "*understand by his acquiescence, that he* "*would carry those wishes into effect*, in case, "for any reason, they failed to be carried into "effect under the other clauses of the will. "* * *

"(P. 115.) The trust in this case *is* impressed "upon the property, not by reason of the in- "tent of the testatrix, but *because* the legatee, "*having knowledge of that intent, accepts the* "*trust*, either upon an express promise to "carry it out; OR UPON SUCH ACQUIESCENCE "AS ESTOPS HIM FROM DENYING that the prom- "ise was made. * * *

"After citing Tee *v.* Ferris (2 K. & J.), 357, "and Rowbotham *v.* Dunnett, 8 Ch. Div, 430, "as to the rule when such bequests are to "joint tenants, the Court continues thus:

"'Applying the rule laid down in these two "cases, we must hold that, so far as the de- "fendants Bartow and Fairchild are con- "cerned, the complaint (which was to fasten a "*secret trust* upon this *residuary* bequest)

"was properly dismissed as to them; and the "judgment must be affirmed.

"But, with regard to Mr. Parsons, the case "*is entirely different.*

"He understood the wishes of the testatrix, "*and by acquiescence agreed to carry them* "*into effect.*"

"As to him, HIS PORTION OF THE ESTATE IS "CHARGED WITH THIS TRUST.

"This trust *is void*, BECAUSE OF ITS IN-"DEFINITENESS.

"The trust, as expressed by the wishes of "the testatrix, and as found in the will, as it "was attempted to be carried out, is to divide "this estate among such incorporated, relig-"ious, benevolent, or *charitable societies* as "THEY shall see fit. It is *well settled* that "SUCH a trust as that IS INVALID (People *v.* "Powers, 147 N. Y., 104; Fairchild *v.* Edson, "77 Hun, 298).

"Where a testator creates a trust *which is* "*invalid, because* it is one which the law will "not *permit* to be carried out; the trust neces-"sarily *fails;* and *the property, which is at-*"*tempted to be bequeathed by the invalid trust,* "GOES TO THE NEXT-OF-KIN (O'Hara *v.* Dudley, "95 N. Y., 403; Stringett *v.* Jennings, L. R. "[10 Eq. Cas.], 488.)

"*This must be the result* as to the portion "of the estate *bequeathed to Mr. Parsons.*

"As to him, the judgment of the Special "Term must be reversed, and judgment ordered "that the portion of the property bequeathed "to him WAS NOT disposed of by the will; and "goes to the plaintiff, *as the executrix of the* "*next-of-kin.*

"It is perhaps unnecessary to say that there "is no claim on the part of anybody that there "is any actual fraudulent intent upon the part "of the executor, or anybody else, to get pos- "session of this property. THE ATTEMPT IS "SIMPLY TO EVADE *the well-settled rules of* "*law*, which render a bequest void, if it "should happen that they were applied to this "case. While such an intent—which has for "its ultimate end, not private gain, but to de- "vote the property to *charitable* use—involves "no immorality, but the opposite;

"yet *there are grave reasons of public policy* "*why such things* SHOULD NOT BE PERMITTED. "In this particular case there can be no sus- "picion that any wrong was intended—EXCEPT "AN EVASION OF THE LAW. While an evasion "of the law like this involves no moral ob- "liquity; *it is the duty of the Courts* ALWAYS "*to condemn it.* * * *

"(P. 118). As to the defendants Bartow, "Fairchild and Huntington, the judgment is "affirmed with costs to be paid by the plaint- "iff. As to the defendant Parsons the judg- "ment is reversed *with costs*, and judgment "ordered that the one-third part of the residu- "ary estate which was *bequeathed to him*, DID "NOT PASS BY THE WILL;

"And shall be distributed by the executors "to the NEXT-OF-KIN.

"VAN BRUNT, P. J.; WILLIAMS and PAT- "TERSON, JJ., concurred.

The Law of Evasion Unchanged.

In Edson *v.* Bartow, 154 N. Y., 212, the Court, by BARTLETT, J., in *affirming* this decision, say:

"*We agree with* the learned General Term, that this provision of the will *is void* for *indefiniteness.* * * *

219. It has long been considered in accordance with a sound public policy, to guard against those improvident dispositions by last will and testament, which are so often the result of a *weakened* mental condition, *due to severe illness*, and the fear that comes to many IN THE HOUR OF DEATH.

It needs no argument to demonstrate that *a secret trust, having for its object* THE CIRCUMVENTION *of this statute*, IS VOID.

This being so, *a Court of Equity*, WILL NOT PERMIT *the legatee to hold his legacy;*

But declares a trust IN FAVOR OF THE HEIR-AT-LAW AND NEXT-OF-KIN. This precise question has been so thoroughly considered, and the authorities reviewed at such length, by this Court in O'Hara *v.* Dudley (95 N. Y., 403) and Amherst College *v.* Ritch (151 N. Y., 282) that a discussion on this branch of the case will not be prolonged. * * *

221. In the case at Bar, it is conceded that there is no evidence, establishing a promise made testatrix, either express or implied,—by Bartow or Fairchild.

The plaintiff's contention is that Bartow and Fairchild are bound by the *implied* promise made *by Parsons.* In order to escape the force of the distinction taken in O'Hara *v.* Dudley, between joint tenants and tenants in common, it is urged that this Court, in Amherst College *v.* Ritch (151 N. Y., 182), expressly eliminated in this State, the distinction in this class of cases between a joint tenancy and tenancy in common.

This criticism is inaccurate, and the conclusion based thereon unwarranted.

There is a very clear distinction between the case cited and the one at Bar.

In the Amherst College case the trial Court found that Ritch and Vaughan,—for themselves *and Mr. Bulkley*,—promised the testator, Mr. Fayerweather, that if he would make them the residuary legatees they would do as he desired.

The General Term held that the facts so found were amply supported by evidence; also, that there was an understanding between Bulkley and the testator that the estate should be disposed of, as the latter desired.

Under these peculiar circumstances,—we held that Bulkley, by accepting the gift,—*ratified* the promise made in his name.

* * * 222. It is freely conceded throughout this case that Mr. Parsons' position has been an honorable one. That his sole object was to carry out the religious and charitable designs of his client who was *in extremis;* and that he never proposed

To hold the legacy in question, for *his own* benefit, in whole or in part.

All this goes without saying.

BUT A COURT OF EQUITY WILL NEVER PERMIT A TESTAMENTARY SCHEME, HOWEVER MERITORIOUS IN ORIGIN OR OBJECT, TO PREVAIL; WHEN IT IS PROVED THAT THE TESTATRIX AND HER RESIDUARY LEGATEE HAVE ENTERED INTO AN AGREEMENT, EXPRESS OR IMPLIED, HAVING FOR ITS OBJECT THE EVASION OF THE STATUTE, AND THE SUBVERSION OF THE PUBLIC POLICY OF THE STATE. * * *

We have already pointed out that, under the judgment in the first action, the legacy of Mr. Parsons, did pass under the will, and second codicil; *and that the Court in the exercise of its equitable discretion,* LAYS HOLD *of this one-third of the estate, in the hands of Mr. Parsons,* individually, as *residuary* legatee; *and impresses a trust thereon* IN FAVOR OF THE NEXT-OF-KIN.

There was no intestacy, as to *this* portion of the estate."

When the Proof of the Secret Trust Came Out—Why a New Suit Was not Then Brought.

But *Your Honors may* ask
If, in the trial of Amherst *v.* Ritch, these fiduciaries and their counsel raised the lid;
Even if it was *years after* they obtained the withdrawals and releases;
If they at the eleventh hour *disclose* the *morning* talk of the dying-day;
Namely, in substance, that the residue was to be given—*not* to the 20 Colleges;
But to OTHER institutions;
Why did we not then *amend* our answer?
Or ask more time, and go into this *new* phase;
And these *new facts*, until then unknown to, the next-of-kin,—and NEVER known to the widow?

The situation was peculiar.

This morning talk was a *revelation* to the counsel for the executor of the widow, and of the next-of-kin.

As you have seen that it was also to the twenty Colleges, and to *their* counsel.

But ONE *witness* testified as to this morning talk.

And as to the new secret trust it evidenced,—namely *Vaughan*.

As already seen the Court,—Justice Truax,—REFUSED TO BELIEVE HIM.

The Court of Appeals later took *the same view*, going out of its way, to give many reasons for doing so.

If true,—his testimony was *fatal* to the claim of the twenty Colleges; for it meant unmistakably an attempt to establish a radically *different* secret trust.

So that the 20 Colleges *spared no pains to encourage this doubt* as to Vaughan's *credibility;*

Whom Mr. Bishop's brief there, for Amherst and Williams, described there as "experienced and sharp——"

His counsel, Parsons, took care to embody in a question, this long interview of two hours,"

All that Vaughan recalled of it,——

Namely, as to the order to pay Mrs. Beardsley a second $100,000; the acknowledgment of what he and Myrick had had a few days before;

Instructions as to the payment of small sums to employees at the store;

and his effort,—if he made any,—to get the testator to increase the bequest to these complainants,——

All this did not need twenty minutes.

Vol. 1. 585. The widow's sister,—Mrs. A. A. Joyce Reynolds—swears (that) it was not over about half an hour, from Vaughan's entrance to the house that morning until he left it in such a hurry, to go to Ritch's office, and have another codicil drawn,

simply adding himself as a residuary legatee of over $1,000,000 *absolutely.*

Why we did not believe Vaughan.

But there was more than mere suspicion to cause us to view his testimony with distrust.

In his cross-examination, my senior—Col. James (who died since the Court of Appeals decision)—asked Vaughan as follows:

(V, fol. 1992) Q. What is the name of your wife? A. Lucy M. Vaughan.

Q. What was her father's name? A. Wright.

Q. Give the full name. A. George M. Wright.

Q. Is he dead? A. Yes."

He was asked this question because the Court of Errors and Appeals of New Jersey had before this handed down a decision—with the Bench almost unanimous,—affirming the decree of Vice Chancellor Pitney in Wright *v.* Wright, 51 N. J. Eq., 475 (in the opinion which appears at length in IV, 259-276, inclusive); it appears in substance that an indigent and ne'er-do-well brother-in-law of Vaughan's, for $250, conveyed all his interest in his father's estate to one Gibbs, for Vaughan;

That *the money was paid by Vaughan, upon representations* to the young man that the estate *was insolvent.*

That, as the Vice-Chancellor found (p. 267):

"Third—On the other hand, Gibbs and Vaughan, as early at least as December 9th, 1886 (the date of Mr. Gray's letter), knew the estate *was not insolvent;* but *could be settled,* and LEAVE A HANDSOME SURPLUS *to be divided among the next-of-kin.*

* * * 273—"For, if it be admitted that, the

Complainant first went to Gibbs, the fact remains that Gibbs, *acting in the interest of Vaughan*, TOOK ADVANTAGE OF THE COMPLAINANT'S NECESSITIES, AND OF HIS IGNORANCE OF THE TRUST CONDITION OF THE ESTATE, ; *and also himself asserted* WHAT HE KNEW TO BE UNTRUE, viz.: that the estate *was hopelessly insolvent;* * * * and that he made a *false pretense* of wishing to buy it, to aid himself in settling with the administratrix.

* * * 274—*No authority is necessary for the position* that complainant, upon his view of the case, *is entitled to relief.*

* * * 275—The Bill was filed upon the theory, that this interest of the complainant in his father's estate was held by Vaughan, for the benefit of the next-of-kin.

This may be so in point of fact;

but it does not *appear so* in the evidence.

That shows that there has been, from time to time, a distribution, or rather several distributions, of the estate; some of it in specie, some of it in cash; and in that distribution, it was divided into the original shares precisely as if the Complainant had NOT assigned his share;

And the share which would have come to him, WAS TRANSFERRED TO, AND PAID TO, VAUGHAN.

The complainant is at present *therefore, entitled to a decree* SETTING ASIDE THE SEVERAL TRANSFERS from himself to Gibbs, *and from Gibbs to Vaughan;*

And for a reconveyance BY VAUGHAN TO HIM, in such manner as to pass title to *real* estate;

And to an account against Vaughan of what he has received under the several distributions referred to. * * *

276. The bill also prays that Vaughan may be decreed TO CONVEY CERTAIN PREMISES, not described or identified, situate in Bordentown, to the heirs of George M. Wright, deceased. The allegations on which *that* prayer is founded, AND WHICH ARE SUSTAINED BY THE PROOFS,—*are that*, in the life time of George M. Wright he purchased and paid for, certain *real* estate in Bordentown (not described) *and had the title conveyed to Mr. Vaughan*, and the conveyance RECORDED ;

That Vaughan thereupon made a conveyance to George M. Wright of the same premises, and delivered it to him !

BUT THAT IT WAS NEVER RECORDED ;

AND THAT, ON HIS DEATH BED, THAT DEED *was produced* AND DESTROYED, I will hear counsel also, as to whether any relief can or should be granted in *that* respect in this cause ;

Or whether the complainant, WHEN THERE SHALL HAVE BEEN A RECONVEYANCE TO HIM BY VAUGHAN, should not raise the whole question by bill for partition of that, and other real estate of which Wright died seized."

This entire transaction not only so affected Vaughan's credibility ; but had ear marks so like these of his work in the present case, and his activity at a similar death-bed scene ; that we could not fail to be affected by it.

With Vaughan thus in an atmosphere so freighted with doubt as to his credibility that the trial Court,—who saw him and heard him, refused to believe him ;

and with this New Jersey decision not reducing that doubt ;

In the pressure of the exacting work of an unusually important trial;

where we had reason to believe the Court would follow the usual course prescribed by law and try ALL issues; and so *would hear and determine* if the *releases* were obtained from these ladies *legally*;

and should *stand*; or *illegally*;

and should *fall*;

Under such circumstances, we should scarcely be blamed for not believing the testimony of this solitary witness; and of his memorandum Oa.

Uncorroborated by any witness;

Or by any other proof.

Especially when, by his own unsupported testimony, he thus suddenly became *absolute* owner of more than a million dollars.

Moreover, *as the Court itself* by its decision shows that it *did not know* whether the widow and next-of-kin *had any right to*, or interest in, *this residue* or *not*;

It was scarcely to be expected that counsel would know *more than the Court did.*

Nor *did* we—nor *could we ever know*, said *rights* and said *interests*, *until* the decision *of t General Term*, *nearly two years later*, that from the moment the testator died, *the widow and kin owned this entire residue*—save the personal bequests there out;

Except for their *releases.*

And then, as it would take but about a year to obtain the decision of the Court of Appeals; and there was ground to hope for justice there;

we awaited the decision of that tribunal.

Newly-Discovered Evidence from an Unexpected Source.

But, soon after it came, there *also came a circumstance, which put the matter in a different light.*

In the rush of the trial, we could not well tell what reliance to place upon what seemed to us an improbable story of a discredited and deeply interested witness.

But now *another* witness was sworn——

One of the most prominent men in the City of New York;

Already one of the leaders of its Bar;

Widely known in various fields of useful and honorable activity—namely, Mr. Parsons.

As already seen at the accounting before Referee Dayton,

AFTER the decision of the Court of Appeals, not only was this memorandum, "Oa", not as we had imagined, an afterthought; not born, perhaps, until years *after the trial*;

The *withdrawals* and the *releases*;

But that *he himself* had it *in his own pocket*, AT THAT VERY PROBATE TRIAL; and swore that he regarded it as OF THE GREATEST IMPORTANCE. And has explained since why he so regarded it; namely, because it *corroborated* Vaughan's testimony as to the morning talk and refreshed his *recollections* in regard to it.

Now the situation *had radically changed.*

With reasonable grounds for doubting *Vaughan's* word;

We knew of *none* for questioning *that of Mr. Parsons.*

Had he told *Justice Truax* what he *now* swore to—there is *no* reason to think that Justice Truax would *not* have believed him.

Moreover, Bulkley—a man whose honesty the testator had tested, and had vouched for.

Whose honesty we have never questioned;

But have thought that he *weakly, and wrongly advised*, did what the others *led* him to do;

Bulkley, Ritch and Vaughan, *disregarding all former* papers, *testamentary and other*,—and *all former* talks,

Had disposed of this *entire residuary estate*, under, and in accordance, so far as we know,—with this very morning talk.

And with *this* evidence of it, that lay *in Parsons' pocket.*

When the case took on *this* aspect;

Then we did not see why Vaughan's word as to this *morning* talk, of November 15th, 1890, *was not quite as worthy of belief as* his word,—which *all* Courts, and *the 20 colleges*, and all *others* connected with this matter,—*except* the widow and next-of-kin and their counsel, *have taken without hesitation*, as to the contents of the "*burned*" codicil, of but *four* days *before*, namely, of November 11th, 1890.

Here, then, when the danger had all passed;

And there was no hope left for the widow and kin of ever breaking their releases and recovering their own;

For, had not the Court of Appeals settled their claims forever;

Now, it *could do no harm to disclose* the *suppressed* "Oa"

So well kept it the back ground, *until* sure that the *withdrawals* and the *releases* were *obtained.*

when we learned *this*, *then* the present suit was begun.

And this Court is *now* asked if a transaction *such as that here described*, with this widow and next-of-kin,—*shall stand.*

An Exception to the Rule of Res Adjudicata.

But in thus concealing from the widow and next-of-kin, and their counsel, the proofs which would have established the rights of these ladies, and their interest in this residue;

And indirectly *mis*representing to them that *they* had *no* rights in it—when said three *fiduciaries knew* all the time, that the *only* trust, under which *they* claimed to hold it, *was void;*

Why did they not bring themselves within the rule in U. S. *v.* Throckmorton, 98 U. S., p. 61, where this Court, by MILLER, J., says:

"In *all* these cases, and many others which have been examined, *relief has been granted* on the ground, that by some *fraud, practised directly upon the parties* seeking relief, against the judgment or decree, THAT PARTY HAS BEEN PREVENTED FROM PRESENTING ALL OF his case to the Court."

Were, or were we not, "*prevented from presenting*" to the Surrogate ALL of our case?

When, by said *suppression* and *mis*representation, they got us to stop the contest, before we had *half* presented our case?

When Mrs. A. A. Joyce Reynolds, who knew more about what transpired in Mr. Fayerweather's household—as shown by her testimony, since, *had never been put upon the stand;*

The mainstay of that home, through all its years of sadness;

With the head of the house,—a remarkable man, starting a poor boy, yet *saving a hundred thousand dollars a year for sixty years,*—money honorably earned in his business;

Do Your Honors,—even in these days of the greatest fortunes the world has yet known,—do you know of *many* men, who have done THAT?

Yet with this man, stricken with a fatal malady,—and for four years gradually wasting under it, until the end came;

With his "beloved wife",—not for four years, but for fourteen years an invalid.—with a disease that no money could heal;

Do you think that this beloved sister,—giving the best years of her life to others;

And so faithfully, that not only did *he* say, and truthfully say,—for Daniel B. Fayerweather was a *truthful* man;

That she had given *her life* for him;

but to whose knowledge of his affairs, loyal devotion, and invaluable aid to this uncommon man, in his feebleness and approach to death;

Not only does this record abound with proofs from witnesses on both sides;

But Ritch himself bears tribute to her fidelity,

upon the very day before the death, when he wrote her,

(I, 596.) "I write you thus freely, *because you* have *known of* Mr. Fayerweather's affairs";

Do you think that this trusted and loved member of this family, upon whom it leaned, in this house which for these four years was a hospital, with double death hovering near;

Could, or could not, have told the Surrogate anything that would have aided him in deciding whether to admit to probate a paper signed with such a looking signature;

By a hand HELD eight hours before a dying man gasped his last?

Had it been held eight hours AFTER he died, would it not have been his act as much as it was when held eight hours before *in the condition in which he was then?*

If this codicil was not signed by a *mortmain*, *what kind of* a hand would you *call* it?

Wherein, in all that is essential to the signing of a paper of great importance,—moving millions of money,—did this signature differ from that of a DEAD hand?

When she had not yet testified to one word;

When Miss E. R. Joyce, *a young slip of a girl*, had *no* opportunity to show that, when, at the Probate contest, Parsons kept making her say *codicil*, *she did not know* that it *was* a *codicil;* or *what* it was, when she was witnessing its execution; and never *did* know until it was explained to her months *afterwards;*

And she then said that it had only been spoken of as a *paper* and *not* a codicil; and said (I, 556);

Deprived of the testimony of Dr. Hamilton, the renowned alienist, to show that Mr. Fayerweather's mind had gone to so great a degree, when he executed this paper, while *dying*—if he ever *did* execute it;

That he was wholly incapable of doing *such* an act;

That his hand WAS SUPPORTED;

Of the witness Dyer, Grout's College class-mate —whose credibility stands unimpeached—made shortly afterwards—to *show Grout's own damaging admissions* that Mr. Fayerweather *had not strength enough to sign*, that *he* had *to support* his *hand, while he was doing so;*

Of the Expert Carvalho—to show that, while the "D" and "B" were plainly written; and *were* manifestly *supported*; the rest of the name was a hopeless "*jumble*"; and the *support* had plainly *been withdrawn;*

As one glance at the photographs of the same will and at the contrast there between his previous signatures and this one, show to anyone (IV, 449, 452);

As to our absolute *ignorance of* our *rights* to this property, *when* we *withdraw* our *objections* to said probate; and gave said *releases;*

Namely, of Vaughan's manifestly intentional *suppression of* the fact of the morning talk which would have told us those rights, until years *after* he *got* our *releases;*

Of Parson's *concealment of* the written *evidence*, which would have aided *very greatly* in informing us of our said *rights.*

Of the conduct *of Beardsley;*

Of the duplicity pervading the conduct of these three *fiduciaries* and of Parsons, almost throughout the entire proceedings;

Were, or were we not, *prevented from presenting* to the Surrogate ALL of our case?

What Chance had the Widow against these Four Men?

Again, when an executor *notifies* the testator's widow *that he will spend every dollar of her husband's estate in litigation;*

And of his private estate;

Keeping her from getting *any* of *her own;*

and tells her that she will *never* get a dollar of it;

And then, at once *deeds it all away;*

when all the time she supposes—and what woman would *not?* and what *man* would not? That a deed is a *deed;* and that it *finally* carries with it, title to the property it describes;

Yet, if, all the time, she is the owner *of a million and a half dollars'* worth of said property;

But he, who threatens her, *has* it;

And has it in his power to carry out his threat;

UNDER SUCH CIRCUMSTANCES would you say, if she agreed to withdraw her objections to the probate, for whatever he offered;

That *such* a withdrawal was her FREE act and deed;

If this brutal message of Vaughan to her, in her condition, situated as she then was, *was not a threat—what would have been one?*

Was it done as a wife is asked when acknowledging the execution of a deed—a deed, "*without* fear or *compulsion?*

If she had *really* known, while borrowing a few dollars to live upon, *that $1,500,000 worth of property was hers;*

and that *all* she had to do to get it, was to ask the Court *to order* that it *be paid to her;* and she would then soon *have* it;

Do you believe that she would *then* have *withdrawn* her objections?

And that she would have *then* put the legal title, the possession and control of this splendid property, into the hands of men, who had just notified her, that they would keep it in Court, *until long after* she *died:*

And *hence*, that *she* would *never* get *a dollar* of it?

When her said consent *to withdraw*, and to *release*, were obtained from her, when she was so enfeebled by fatal disease;

and so broken,—in the darkest hour of her life,—by her husband's apparent *want of* affection for her;—

the most cutting, terrible part of it all,—

practically leaving her *to starve*, in "the discretion" of these three *fiduciaries;*

When, by all accounts, she and her husband had lived so *happily* together *for almost forty years;*

And, the world was wondering *why* he had thus cut her off, *without explanation;*

When she was so startled, and stunned;

That, as her physician testified, her disease was

gravely aggravated by this treatment, of these three chosen "*friends*" and *fiduciaries* of her husband ;

By receiving from those, to whom her husband had delivered almost a small fortune, especially in order that they might *protect* her, *and look to her wants :*

When she had received *notice of no dollar* from her husband's estate from *these* men ;

And of *years of litigation*, when she had *but a year* then to live ;

Does it seem to your Honors entirely right to get a woman's property from her by getting her into *such* a state by *such* means and under such circumstances ?

And *then* to *take advantage of her condition and circumstances ?*

Does Such Work Commend Itself ?

Does it seem to you *fair* and *just ? Does it satisfy your* understanding, your sense of right dealing,—that her *withdrawal* of objections to the probate of a will of a vast estate,

should be allowed to *stand* when that withdrawal was obtained for *about ten cents on the dollar ;*— upon the express *representation* that she did *not* own *one* dollar of said estate ?

The comparative force of *suppression* and *misrepresentation* as viewed by the Courts—will be seen presently.

When the very men who made this representation *had their proofs in their possession*,—and *knew* that *she* was NOT AWARE OF *any such proofs ;*

and also knew *that she owned* a million and a half dollars' worth of this estate?

Would your Honors call *this* method of obtaining from a widow *her heritage*,—one that should receive the countenance and sanction of a Court *of Justice?*

If these three *fiduciaries* knew that the only way they could obtain *our withdrawals*, our consents *to release*, and our *releases*, by the *illegal* methods and means just referred to;——

what was *their duty* as to the widow and next-of-kin, in a suit by the 20 colleges, to fasten a *secret trust* upon the *residuary* bequest?

The question *needs* no answer.

A Double obtaining of Decrees by Fraud.

But Your Honors have observed that the Bill does not confine the charge that the judgment was obtained by fraud *to the Surrogate's* decrees.

It also alleges, in substance, *that the judgment in Amherst, etc., et al.* v. *Ritch, etc., et als., was obtained by fraud;*

In that the defendants *combined to prevent* the entry of any judgment, upon the *actual* determination of *the issue*, as to the *validity* of the releases;

Which Your Honors have now seen that *all* parties have all along recognized was the CHIEF issue in the case; and that they *requested and induced* the Trial Court to *hold* that the *right* of the respective parties *did* NOT require *any* decision of *that* issue;

That the Trial Court *did* as so *requested;*

And did NOT decide said issue;

That, upon appeal, the General Term, *by fictions of law, imputed to the* Trial Court that it *did* try said issues;

That upon *that* theory it then affirmed said decision;

That, in so deciding, the General Term had *appellate*, but *not original* jurisdiction;

That the Court of Appeals then decided that the widow and next-of-kin *had no standing*, to have their rights determined *there;* because *it had no power* to look into the *facts;*

But was bound *by the record;* and could *not* review it.

It is thus alleged in the Bill, that the judgment in Amherst *v.* Ritch *was obtained by fraud:*

Practiced *upon the Court, in inducing it to ignore a vital issue*, duly pleaded;

That, so induced, it *did* ignore it;

An issue that, as already seen, proves to be the hinge-issue in this cause.

Whether defendants *did so request* and *induce* said Trial Court;

and whether that Trial Court *yielded to* their said solicitations, and *did* ignore that issue—will be seen in the consideration of the next question.

But the question is now—Does this not bring the Truax judgment in Amherst *v.* Ritch *also under the rule* of this Court, already cited?

Our position is, in effect, that, *by reason of something done by defendants, there was, in fact,* no *adversary trial;*

Or decision of the *chief* issue in the case.

In U. S. *v.* Throckmorton, 98 U. S., 61 (*supra*), this Court says, by MILLER, J.:

"But THERE IS AN ADMITTED EXCEPTION TO this general rule in cases where, *by reason of something done by the successful party to a suit, there was in fact,* NO adversary *trial, or decision,* of the *issue* in the case."

If then, there *was* in fact NO *adversary trial or decision of* the *issue* in the case, why is not the door open for *that* trial *now?* If we have had *no* trial, why should we not *have* one?

DID defendants get Justice Truax *not* to try that validity? Let us look and see.

As already seen, the solitary position of defendants in this suit, is stated in their Pleas; and as set forth in the final decree, is that the question of the right of the widow and next-of-kin *is res adjudicata.*

That the *validity* of their releases WAS tried by the Trial Court in Amherst *v.* Ritch, namely, by Justice Truax.

That our right to this residue is, therefore, *res adjudicata.*

That the decision of Justice Truax *was* due process of law. And that it gave us *the equal protections of the laws.*

THAT is *their* case.

If they are *wrong* about this;

If there has been *no res adjudicata;*

If our right to this residue has NEVER been decided;

Their case *falls.*

Have the Widow and Next-of-Kin Ever Had a Trial?

What then is *the fact?*

Has our right to a net one-half of said residue, above the personal bequests, EVER been *decided* by a Court of competent jurisdiction?

What *did* take place?

Res adjudicata means that the matter *has been adjudged.*

Has this matter, the validity of our deeds of release, by which we parted with this large property, *ever* been duly adjudged?

If so, it must have been *in some Court.*

What Court *did* it?

Not the Surrogate's; for *that* Court *had no jurisdiction to* determine *the validity of* a release.

The *only other* Trial Courts before which it has been, were the N. Y. Supreme Court; that is, before Justice Truax.

And the Circuit Court of the United States; that is, before Lacombe J., from whose decision the present appeal is taken.

What is Sworn to in the Pleas.

The *only* one of these which is *claimed to* be *res adjudicata* is the decision *of Justice Truax.*

DID HE then *decide* it?

What do *defendants* say?

They say *this.*

The Pleas of all defendants to the Bill and Cross-Bill herein, are all substantially alike in making the following statement, which is quoted from the Plea of *Hamilton* College to the Bill (I, 179).

"*The issues* raised by the said answer (of The present Complainants) and the *whole* issues in said action (of Amherst *v.* Ritch), *were thereafter*, and on or about the 24th day of January, 1894, regularly *brought on for trial; and were tried* at a Term of the said Supreme Court, duly held in and for the County of New York, *at which presided Hon. Charles H. Truax*, one of the Justices of the said Court.

Upon such trial the said Complainants produced, and gave testimony in support of their said allegations, attacking the *validity* of the said agreements, releases and settlement;

AND THE SAME WAS DULY HEARD AND CONSIDERED BY THE SAID COURT;

AND THE QUESTIONS OF FACT, AND THE QUESTIONS OF LAW THEREBY PRESENTED, were duly *argued* before the said Court, for the said complainants by their counsel, learned in the law;

AND WERE LIKEWISE CONSIDERED BY THE SAID COURT;

AND UPON THE ISSUES SO PRESENTED, the Court thereupon DECIDED in favor of the said five colleges, and against the Complainants herein;

and decided that the said Five Colleges and other corporations *were entitled to* the said *residuary* estate; and to the *whole* thereof; and that said *complainants* had *no* interests therein, whatever.

* * *

SOUTHERN DISTRICT OF NEW YORK, } ss.:
City and County of New York, }

ELIHU ROOT, being duly sworn, deposes and says: I am one of the trustees of the corporation, the Trustees of Hamilton College, one of the defendants in this suit; I have read the foregoing Plea and answer of the said defendant, and am familiar with the contents thereof.

THE SAID PLEA AND ANSWER ARE TRUE IN POINT OF FACT, TO MY KNOWLEDGE; except as to the matters therein stated to be alleged on information and belief; and, as to those matters I believe the said Plea and answer to be true.

Neither the Plea nor the answer, is interposed for delay.

ELIHU ROOT.

Sworn to before me this 16th }
day of September, 1898. }
FRANCIS R. FORAKER,
[SEAL.] Notary Public,
New York County.

(It should be carefully noted here that said extract from said Plea of HamiltonCollege is *not* anywhere in it stated to have been made,—*either in whole or in part*, thereof *upon information and belief*).

The statement in regard to it is therefore "The said Plea and answer *are true in point of fact, to my knowledge.*"

We have thus the *unqualified sworn* averment, by a proper representative of each of said defendants, that Justice Truax, *did consider, pass upon,*

and decide as to the *validity* of these releases, obtained from the widow and next-of-kin as aforesaid.

Which will be considered presently.

But conceding the Circuit Court's jurisdiction of a case where the requisite diversity of citizenship, and value, exists;

And that this is a suit to establish that the decrees of the Surrogate, admitting said Will and its four unburned codicils to probate, were obtained by fraud upon the Court;

And that it is also a suit (as described in U. S. v. Throckmorton, (*supra*) to establish, that the judgment *in Amherst* v. *Ritch was obtained because by reason of something done by the successful party, there was in fact no adversary trial or decision, as to the validity of the releases;*

But of both of which facts the proof, as is seen, appears to be abundant;

Yet *was there not a trial in Amherst* v. *Ritch* of the *very question* which we are *now* asked to try:

Namely—Are these releases *valid: or invalid*;

Hence *is not* this case, as to THAT question, *res adjudicata?*

Comparison of *the issues* in the two cases, will help to answer,

1. *Were* the issues in *that* suit,—and in *this* suit the same?

2. Was the *validity* of the releases an issue in *that* case?

The Issues as Stated by Judge Wheeler.

The issues in Amherst *v.* Ritch, are thus described *by Wheeler, J.*, in his Opinion, *overruling the Demurrers* in the *present* suit.

(I, 85.) He says :

"The complaint, after alleging the will, the codicils, the probate, and the writings by which the defendants would be bound to pay over to these and other colleges, the residue of the estate ;

Further alleged that the plaintiffs here "*Claim to have* some interest in the said *residuary* estate, *as next-of-kin* ;"

And *prayed* that it be *adjudged and decreed* that *all* of said *residuary* estate, devised and bequeathed to the defendants Ritch, Bulkley and Vaughan as executors and trustees, *except the particular bequests,—was then held by these defendants, in trust for those plaintiffs there,* as the several institutions mentioned ;

And further, that the *ultimate* rights of those plaintiffs should be determined by the judgment in the action in accordance with the allegations of the complaint".

(Said three *fiduciaries* in their *answers there denied* any *promise* or trust. And said that said residue was bequeathed to them absolutely.)

"The plaintiffs here appeared as defendants there ;

And *set up* the *fraudulent obtaining of* the releases ;

And alleged that they were *not* bound thereby ; and *prayed* that the defendants, Ritch, Bulkley

and Vaughan as executors, and trustees, might be required *to account* to them for their shares in the residue of the estate, after paying over the specific bequests."

P. 91. * * * That suit was *not* however *an interpleader*, by Ritch, Bulkley and Vaughan, according to the course of equity procedure ; where the claimants would be brought in ; and required to litigate their claims *between themselves*, respectively,

But *was* for the *recovery of* property *of those defendants only ;*

And the rights of these plaintiffs were *collaterally* involved as a defense, *excluding the rights of* the plaintiffs there, in the determination of the case, against the defendants there, of whom a recovery was sought.

P. 90—" As *that* case is made to appear from the allegations of the Bill, as admitted by the demurrer, the judgment or decree *was entered, without* the *issue* as to the *validity* of the releases, *having* been, by *either* of the Courts, at *any* time, *tried and determined*, upon evidence, as a matter *of fact.*

That judgment or decree was *not* against *these plaintiffs*, for *the recovery of* money or property.

But was *against Ritch, Bulkley and Vaughan*, for *such* a recovery *of them ;*

Where the rights of the plaintiffs *were only collateral.*

And *that* recovery, upon the case as made to appear, *did not so necessarily involve the decision and determination of* this *collateral* issue, as *such* a recovery of money or property from *these* plaintiffs themselves.

A *general* finding and judgment against the

party, *for the recovery of money, or of property*, seems to draw interest, and conclude, *all* questions which *might* arise in determining the right of recovery against *that* party.

But, when *an outside, or collateral issue* is involved, to make the decision upon *that* conclusive, *it should appear that this very question was involved*, AND ACTUALLY DECIDED, *somewhere* in the proceeding (Cromwell *v.* County of Sac, 94 U. S., 351).

In Amherst v. Ritch, the Validity of the Release was a Collateral Issue.

As thus seen, Amherst *v.* Ritch was a suit by five of the 20 colleges against said three men to recover *from them* said residue;

Which the said 20 colleges claimed that said men held in trust *for them.*

It was *not* a suit to recover anything *from the widow and next-of-kin.*

They were joined as defendants *because* they *claimed* some interest in said residue.

No other party conceded *their* claims.

As Judge Wheeler says, said three men *did not interplead;* and so admit that *they* were *mere stakeholders*, and invite the *real* claimants to make the contest between themselves.

They were sued as the *chief* defendants—the *only* defendants—having the *legal* title, in possession of the property; and to recover the property *from them;*

By Colleges which claimed to own it *absolutely.*

As *anyone* might sue another, who, he claimed *had* his property, to recover it.

Defendants Urged upon Justice Truax that the Widow and Kin had No Standing in Amherst v. Ritch.

It *did not need the* widow and kin, to have it determined as between the twenty colleges and the three *fiduciaries which side* owned this residue.

They—the 20 and the 3—took *that* position *in their pleadings.*

They *took it at the trial.* As to that, they have been consistent throughout.

They are *not* here *now*,—saying that they did *not* so take it.

How they took it at the trial appears from the following:

(V, 316, 317.) In Amherst *v.* Ritch, by Mr. James (being almost the *first* word he spoke in that trial),

Q. How long had you been acquainted with Mr. Daniel B. Fayerweather, before his death?

Mr. Parsons.—We would like to inquire *for whom*, in putting this question, Col. James is acting?

Mr. James.—I am acting *for the widow, and for Mrs. Achter and Emma S. Fayerweather.*

Mr. Parsons.—The next of kin?

Mr. James.—Yes, blood relations.

Mr. Nash (leading counsel for the donees under the deed of gift).—"WE THINK THEY HAVE NO STANDING IN THIS CONTROVERSY until AFTER the decision of the main question.

"*Mr. James.*—Your Honor, I suppose this case is to be tried as a *single* case?

The Court; I shall allow Col. James to ask the question.

Mr. Nash.—I should like to state my objection.

"I object that the widow and next-of-kin, UNDER THE PLEADINGS in this cause, HAVE NO STANDING IN COURT, in reference to the litigation of the plaintiffs, to establish a trust for institutions, different from those created by the deed of gift;

And THAT THEIR interest in the case IS ONLY CONSEQUENTIAL UPON certain decisions, to be made, or ULTIMATELY to be given, by Your Honor."

Objection overruled; exception.

Mr. Parsons.—I wish to have *the same* OBJECTION put upon the record, IN BEHALF OF THE CLIENTS I REPRESENT."

(Namely said three *fiduciaries.*)

The Court.—Objections overruled; exceptions."

Their claim then thus made, and pressed all along the line, *was*, that the widow and next-of-kin *had* NO *standing* in *that* suit,

Hence that *either* the 20 colleges, *or said three men, owned* said *residue.*

And that the widow and next-of-kin, therefore, COULD NOT *own it.*

Naturally the validity of the releases of *what they never owned*, they claimed to be *immaterial.* Not only by counsel, but by Justice Truax him-

self in his decision, where, referring to that validity, he says (IV, 50):

"The view that I have taken of the facts and the law of this case, renders it *unnecessary for me to consider* the very interesting *questions* of law, propounded by the learned counsel for the defendants Reynolds, Achter and Fayerweather."

That Judge Wallace also held it to be *immaterial*, will be seen from these words in his opinion:

"The Trial Court held that the releases *were without effect on the rights of* the parties;

But is the decision of an *immaterial* question in a case—if there was *such a decision there res adjudicata* as to *that* question, arising in *another* and a different case?"

Amherst v. Ritch Was a Suit to Fasten a Trust on the Residue. The Present Suit is to have the Residue Delivered to its Owners.

Amherst *v.* Ritch was a suit *to fasten a trust* upon this *residue;*

And to recover it *from said three men.*

The present suit is not *that* at ALL.

But is one— FIRST, *To set aside* the Surrogate's probate *decrees*, because they were *obtained by fraud upon that Court;*

Which fraud was hid from said next-of-kin until three years after their *withdrawal* of objections, and their *releases* were so obtained from them;

Which fraud was *never* known to the *widow*, because she *died.*

SECOND.—To set aside the TRUAX decision *because, by reason of something done* by said three men and said 20 colleges, *there was no adversary trial or decision of the issnes as to the validity.*

It will scarcely be claimed that a suit *to fasten a trust upon property*—then to recover it from those who have it; *is the same thing as* a suit to *set aside a judgment, obtained because of defendants preventing the trial or decision of that very* case.

Or that *the issues* are *the same.*

The closest scrutiny of the complaints and of the answers, in Amherst *v.* Ritch, will find *no* reference or suggestion of *obtaining the probate decrees by fraud upon the Court;*

Nor, is it necessary to add, will it also find any reference to so obtaining *the very judgment in* Amherst *v.* Ritch by defendants, by preventing *the trial or decision of that very case itself.*

Because among the issues, in the two cases, there was a *common issue;*

namely, *the validity* of the releases;

Does *that* show that *that* issue *was considered and decided* in *that* case;

Or was necessarily involved in it;

Or that the controversy between plaintiffs and defendants in that suit *turned upon* that question?

Upon whether the said three men took the residue *absolutely or upon a trust* outside of the will, *for the 20 colleges.*

The Court held that they took it in the *latter* way;

That, as that trust *was outside* of the will;

It did *not* offend against Chapter 360 of the N. Y. Stats. of 1860, which prohibited *willing* over one-half;

Because it was not *willed* to colleges;

But was willed *to individuals.*

And because the trust was not one *upon the face of* the will;

But *outside of* the will.

Hence one that did *not* come within the prohibition of anything done *in* the will.

Hence was valid.

Hence that the residue belonged to said 20 colleges.

That is what the controversy *turned on* in Amherst *v.* Ritch.

Upon the fact that, as no law prohibited a bequest *to individuals;*

Upon a trust *outside of* a will, for *such* institutions;

Said 20 colleges should recover said *residue.*

How was *that* in any way a holding which *turned upon* the question whether the *releases were valid* or *not?*

If, as the Court found, no law forbade *willing* said residue to *individuals;*

Notwithstanding that they had promised, that they would so get it to said *institutions;*

Which could *not* take it, *upon the face of* the will;

Then, as said residue was *legally* willed to said *individuals;*

and as they were trustees of it *for said 20 Colleges;*

How did *the widow and kin* then own *any of* said residue?

And if they owned *none*—why should the Court decide as to their releases *of nothing?*

Precisely what it *did* decide, was that the *legal title* to said residue *was in* said three men;

The *equitable* title *in the 30 Colleges;*

That no title or interest was in the widow and next of kin;

and that there was *nothing at all in it* that *they* had *to release;*

It would be *idle* to decide as to the releases *of nothing.*

Hence it did *not* so decide.

Hence the controversy in Amherst v. Ritch did *not turn upon* the *validity* of the releases.

Since the counsel for the *defendants* urged the Court itself in Amherst v. Ritch, and the United States Circuit Court of Appeals by Wallace, *J.*, each held, that the issue as to the validity was *immaterial.*

And each stood upon that position.

And our claim that it was material was ignored.

Hence that that issue *was immaterial,* a glance at the disposition of *immaterial* issues and as to the controversies upon which a cause *does not turn,* as referred to by the Courts, may not be out of place here.

The Law as to Irrelevant Issues.

In GENET v. DELAWARE AND HUDSON CANAL CO., 163 N. Y., 178, the Court, by *Cullen, J.*, say:

"The general rule is that a judgment is conclusive upon the parties thereto, *only* in respect to

the grounds covered by it, and the facts *necessary to* uphold it.

And, although a decree, in express terms, professes to affirm *a particular fact;* yet, IF *such* FACT WERE *immaterial to* THE ISSUE;

and the controversy *did not turn upon it;*

The decree *will not* conclude the parties—in reference to *such* fact" (People *v.* Johnson, 38 N. Y., 53).

STANNARD *v.* HUBBELL, 123 N. Y., 528, ANDREWS, J.:

"Only *material*, relevant, and necessary facts, *decided in* a former action, are conclusively determined thereby.

The judgment does *not* operate as an estoppel as to *immaterial* or unessential facts, *even though put in issue by the pleadings, and directly decided* (Campbell *v.* Consalus, 25 N. Y., 613; People *ex rel.* Reilly *v.* Johnson, 38 *id.*, 63; Woodgate *v.* Fleet, 44 *id.*, 1; Sweet *v.* Tuttle, 14 *id.*, 65)."

Does Holding an Issue to be Immaterial Decide that Issue?

But this is a long way from the real question here.

Does holding an issue to be *immaterial* DECIDE that issue?

If it was *immaterial*, how was it *necessarily involved in* the decision of that case?

Since when was an *immaterial* thing *material?*

Is not the *real* question here,—*Did* the Trial

Court, Justice Truax, in Amherst *v.* Ritch, decide the issue as to the *validity* of the releases?

As this Court put it, in LAST CHANCE MINING Co. *vs.* TYLER MINING Co., 157 U. S., 690, by BREWER, J.:

"The *essence* of estoppel judgment is that there *has* BEEN a judicial DETERMINATION, *a fact*, AND THE QUESTION ALWAYS IS, *has* there been *such* determination? and *not* upon what *evidence* or *by what means* it was reached."

As was said by the Court of Appeals of New York, in Bell *v.* Merrifield, 109 N. Y., 209, by PECKHAM, J.:

"It is true that a valid judgment, upon a question directly involved, in a suit is conclusive evidence as to *that* question in any other suit, although for a different cause of action between the same parties. But it *must* appear, either by the record in that suit, or by extrinsic evidence, that *the precise question was raised and determined* in the former suit; and this burden rests, of course, with the party who endeavors to make use of the judgment as conclusive evidence upon *that* point.

If there be *uncertainty* as to whether or not the *question was* passed upon, *the judgment is not conclusive* as evidence.

(See Stowell *v.* Chamberlain, 60 N. Y., 272; Russell *v.* Place, 94 N. Y., 606; Cromwell *v.* County of Sac, *id.*, 351.)'

In Ward *v.* Boyce, 152 N. Y., 203, the Court, by O'BRIEN, J., says:

"Did it prove that *the disputed fact* was in is-

sue, litigated AND DETERMINED, in the former suit?

If it failed at ANY of these points, IT COULD NOT CONCLUDE THE plaintiff."

In Reynolds *v.* Aetna Life Ins. Co., 160 N. Y., 550, the Court, by MARTIN, J., says:

"It must be regarded as *the established law* of this State that a judgment *is not conclusive* in a *second* action unles *the same question* was at issue in a former suit, of which that Court had competent jurisdiction;

and the subsequent action is between the same parties or their provies.

The conclusive character of a judgment, as at Bar, extends *only to the* identical *issues*, WHICH WERE *tried* IN THE FORMER ACTION.

They must be the same in each action, not merely in name, *but in fact and in substance.*

And the party seeking to avail himself of a former judgment as conclusive evidence, or as a bar in a subsequent action *must show affirmatively* that *the question* involved in the second *was material and determined in the former.*

As a former judgment *would not* operate as an estoppel in a subsequent action *as to immaterial and unessential facts, even though* put in issue and directly decided.

It is final *only as to facts* litigated and decided, which relate to the issue; and *the determination of which was necessary to the determination of that issue* (Palmer *v.* Hussey, 87 N. Y., 300; Bell *v.* Merrifield, 109 N. Y., 202; Russell *v.* Place).

Has there then been a judicial determination by Justice Truax in Amherst *v.* Ritch of the *fact* of the *validity* or invalidity of the releases?

As all the Pleas SAY that there HAS BEEN.

As each Plea is made upon the solemn oath of an important person connected with one of the 20 defendant institutions ; or by one of said three *fiduciaries ;*

And is made *without limitation, qualification or restriction years after* Justice Truax made his decision ;

and so *with ample time to know* beyond doubt that to which they were *swearing ;*

There must be some ground upon which they *based* their several *oaths.*

As but *two* of said defendant institutions *are in New York City :*

And a large majority of them *are out of New York State.* It is probable, indeed it will scarcely be questioned that those who so swore *derived their information and knowledge* upon the question whether Justice Truax *did* so consider and decide as to the validity of the releases, or not ;

from reading his opinion and decision ;

From the advice of their counsel ;

Or from the advice of *other* counsel.

As this statement *first* appears in the Plea of *Hamilton* College to the original Bill ;

and that bears date, by the oath of Elihu Root September 16th, 1898 ;

And as *no other* Plea was filed until nearly *an entire year later* ;

As the words used in Hamilton's plea *are the identical words used in* the Pleas of *all other* defendants ; upon *this point* ;

It is apparent that they obtained *the form of* the statement from the Plea of Hamilton.

How many of them relied *for the truth of* this statement upon the fact that Hamilton had made it, and that Mr. Root had sworn to it, *they* will know.

But the question here is, Is *that* statement TRUE?

Or, as this Court says in Last Chance Mining Co. *v.* Tyler Mining Co., 157 U.S., 690, by BREWER, J., "Has *there been* such determination?"

We are trying then to find out, if Justice Truax *did* just what Mr. Root swears unqualifiedly, that he *did* do.

Namely, in Plea of Hamilton to the Bill.

(I, 180.) "Upon such trial the said complainants produced and gave testimony in support of, their said allegations, attacking the *validity* of said agreements, releases and settlements;

AND THE SAME *was* DULY HEARD AND CONSIDERED BY THE SAID COURT.

And the question of fact, and the questions of law, *hereby* presented, were duly *argued* before the said Court, for the said complainants, by their counsel, learned in the law;

AND *were* likewise *considered* BY THE SAID COURT;

AND UPON THE ISSUES *so* PRESENTED, THE COURT THEREUPON *decided* in favor of the said Five Colleges, and against the complainants herein.

And decided that the said Five Colleges, and other corporations, were entitled the said residuary estate; and to the whole thereof;

And that said complainants had *no* interest therein whatever."

Three sources of proof are at our disposal—namely:

(1) Justice Truax's *Opinion.*

(2) His *decision.*

(3) *His sworn statement as a witness*, when examined, called by Complainants and by this Cross-Complainant, in this present case.

Four short passages in his Opinion, bear upon this question, namely; (IV, 47).

"That this trust is NOT a *testamentary* trust, that is *not* a trust created BY WILL, was decided (in Oliffe *v.* Wells (*supra*). It seems clear to me that, if this trust was *not* created by will, *it does* NOT *come within the prohibition of the statute of 1860.*

And that it is a *valid* trust; and should be carried out by the residuary legatees;" * * *

P. 49. But, in any event, the North Western University *is* entitled to take; *because* the legatees mentioned in the *ninth* clause of the will (namely the 20 colleges) who are *the* ONLY persons,—*in the view that I have taken of the law of this case,—interested in* its *not* taking, consent to its taking. * * *

In the view I have taken of the law of the case, that payment was made from the fund *that belongs to* THOSE *institutions*, ALONE. (Namely the 20 Colleges.) * * *

P. 50—"The view that I have taken of the facts and the law of this case renders it *unnecessary for me to consider* the very interesting questions of law propounded by the learned counsel for the defendants Reynolds, Achter and Fayerweather."

That Justice Truax thus held that Chap. 260 of the N. Y. Stats. of 1960 *applied;*

That the entire residue went *to the 20 Colleges.*

That *nothing* went to the widow and next of kin;—

is thus seen *from his own words.*

If, as he says, this view made it *unnecessary to consider* the questions as to the *validity* of the releases;

For no one claims that he refers to anything *else*, by *that* passage;

How came Mr. Root, and all the others,—to swear unequivocally that Justice Truax *did* consider that validity?

Perhaps his *decision*, will shed light upon the matter.

The grounds of the Decision of Justice Truax.

It says (I, 63):

"The grounds upon which the issues have been decided are, that the defendants Thomas G. Ritch and Henry B. Vaughan for themselves, and on the part of Justus L. Bulkley, promised Daniel B. Fayerweather, now deceased, and induced him to believe that, if he would make them, and the defendant Justus L. Bulkley, residuary legatees, of his estate;

As provided in the codicils to his will, dated December 13, 1884, and November 15, 1890;

the said residuary legatees would sell and convert said residuary estate into cash; and divide the same equally, share and share alike among the 20 corporations mentioned in the ninth paragraph

of the said Daniel B. Fayerweather's will, dated October 6, 1884, including the plaintiffs; after paying $100,000, to the North Western University. and that the said Daniel B. Fayerweather made the said Ritch, Bulkley and Vaughan residuary legatees in and by the said codicil, in reliance upon the said promises and inducements; and died leaving the said Ritch, Bulkley and Vaughan, his residuary legatees in the belief so induced by them, that they would sell, convert, and distribute the residuary estate, as aforesaid.

And that the said Ritch, Bulkley and Vaughan have attempted to dispose of the said residuary estate, in violation and disregard of the said premises.

And the Court does hereby direct that judgment be entered upon the issues of this action, that the residuary estate, devised and bequeathed to the defendants, Ritch, Bulkley and Vaughan, by the said last will, and testament, and codicils of Daniel B. Fayerweather deceased, was received, and is held by them, in trust for the plaintiffs herein, and the several institutions named in the ninth paragraph of the said will;

And for the North Western University, in the sum of $100,000. That the said residuary estate, except that part thereof necessary to provide for the payments mentioned in the third paragraph of the plaintiff's prayer for relief, was received and is now held by the said defendants, in trust, to sell and convert the same into cash;

And to divide the same, giving to the North Western University, $100,000., with its just and equitable proportion of the income, earnings, and interest, accrued upon the trust fund, as between it, and the institutions named in the ninth clause of the will;

And the said several corporations, mentioned in the ninth paragraph of the said will, the remainder thereof, share and share alike."

And for an injunction and accounting.

The Decision Silent as to the Validity of the Releases.

The decision is thus *silent* as to the *validity* of the releases. Nothing in it even hints that there ever *were* any releases. But it will be urged that, even though there was no "*Determination of the fact*" as to the *validity;*

even though the decision *says* nothing about it;

yet that decision *could not have been reached without* a determination of the facts as to the *validity.*

The Law of "Necessarily Involved In."

That the rule laid down by this Court, in Wiggins Ferry Co. *v.* Railway—142 U. S., 410—by BROWN, J., applies, namely:

"If the judgment be upon the pleadings and proof, the proposal extends not only to what *was* decided, but to all that was *necessarily involved.*"

Hence, that the question as to the *validity* of the releases *was necessarily involved in said* decision, as to the title of the residue;

Hence, that the question as to the *validity* is *res adjudicata.*

A glance at one or two decisions may be of service here.

In CARLTON *v.* LOMBARD, 149 N. Y., 137, the Court, by O'Brien, J., say:

"The record of the proceedings in Vermont contains no pleading from which the *actual* issues be-

tween the parties can be determined. Nor does it contain any findings of fact to show that THE DISPUTED FACT involved in the present action *was* in issue, LITIGATED OR DETERMINED, in the Vermont Court.

No *extrinsic* proof that it was so litigated or determined was given on this trial.

IT IS *no* ANSWER TO THIS TO SAY THAT *it must have been involved since* THE JUSTICE RENDERED FOR THE PLAINTIFF. *We do not know*, AND CAN NOT CONJECTURE, upon *what* ground the judgment of the Justice was based. * * *

There is no indication on the face of the record that *such questions were* in issue, *litigated or determined.*

If, however, any *such* question *was* in fact litigated and determined before a Justice of the Peace that fact should have been shown at the trial to be extrinsic proof before the record could conclude or estop the plaintiff. * * *

203.—The *only* question with which we are now concerned is, what *did* it prove?

Did it prove *jurisdiction of* the Court?

Did it prove that the plaintiff *was a party* to the former suit, in the sense that she was concluded?

Did it prove that the DISPUTED FACT *was* in issue, LITIGATED AND *determined* IN THE FORMER SUIT?

If it failed *at any of these* points IT COULD *not* CONCLUDE THE plaintiff.

We think it *did* fail on one or more of these points for the reason stated. And that the trial Judge was NOT bound to give to it the merit and force of conclusive evidence."

IN RUDD *v.* CORNELL, 171 N. Y., 127, the Court, by MARTIN, J., say:

"As the appellant claims that the judgment in that action was an estoppel in this the burden of proof was upon her to show *clearly* that the QUESTION IN ISSUE in this case WAS LITIGATED AND *determined* in the former action.

(Zoeller *v.* Riley 109, N. Y., 102.) That burden she has *not* borne.

P. 127. "The conclusive character of a judgment *extends* ONLY *to the precise issues* which *were tried* in the former action;

They must be identical in each action, not merely in name, but in fact and in substance;

And the party seeking to avail himself of a former judgment *must show affirmatively* that *the question* INVOLVED IN the second action *was material* and *actually determined* IN THE former;

As a former judgment will *not* operate as an estoppel as to *immaterial* OR UNESSENTIAL facts even though put in issue and directly decided.

In other words, a former judgment is final *only as to* the FACTS which are *actually* LITIGATED AND DECIDED which relate to the issue therein; and the determination of which was necessary to the determination of that issue.

(Reynolds *v.* Ætna Life Ins. Co., 160 N. Y., 651.)

This Court has expressed itself upon this subject in RUSSELL V. PLACE, 94 U. S., 608, by FIELD, J., thus:

"It is undoubtedly settled law that a judgment of a Court of competent jurisdiction upon a question *directly* involved in one suit is conclusive as to THAT question in another suit between the same

parties. But to this operation of the judgment it *must appear* either upon the face of the record or be shown by *extrinsic* evidence that *the precise question was raised and* DETERMINED in the former suit.

If *there be any uncertainty on this head* in the record as for example, if it appear that *several distinct matters may have been* litigated, upon one or more of which the judgment *may have* passed, *without indicating which of them was litigated;* and upon which the judgment *was* rendered, THE WHOLE SUBJECT MATTER OF THE ACTION WILL BE AT LARGE AND OPEN TO A NEW CONTENTION unless this uncertainty be removed by *extrinsic* evidence showing the *precise* point involved AND DETERMINED. To apply the judgment and give effect to this adjudication ACTUALLY made, when the record leaves the matter *in doubt, such* evidence *is admissible.*

Thus, in the case of The Washington, Alexandria and Georgetown Steam Packing Co. *v.* Sickles, reported in the 24th of Howard, a verdict and judgment for the plaintiff in a trial action against the same defendant on a declaration containing a *special* count upon a contract and the *common* counts, was held by this Court *not to be* conclusive of the existence and validity of the contract set forth in the special count; BECAUSE the verdict *might have been rendered* WITHOUT REFERENCE TO THAT COURT; and ONLY upon the *common* counts. Extrinsic evidence showing the fact to have been *otherwise which was* necessary to render the judgment an estoppel upon those points."

IN PACKING CO. *v.* SICKLES, 5 Wallace, 580, the Court says:

"That to render the judgment conclusive, it

MUST appear by the record of the prior suit that *the particular matter* sought to be concluded was *necessarily tried or determined;*

That is, that the verdict in the suit COULD NOT HAVE BEEN RENDERED WITHOUT DECIDING THAT MATTER; or it must be shown by *extrinsic* evidence that the verdict and judgment NECESSARILY involved the consideration and determination of the matter."

In the light of these decisions, a passage from Freeman on Judgments, Section 257, may not be out of place here.

It there states that

"It is allowable to reason back from a judgment to the basis on which it stands, upon the obvious principle that, where a conclusion is indisputable, and COULD HAVE been drawn *only* from CERTAIN premises, THE PREMISES ARE EQUALLY CONCLUSIVE AND INDISPUTABLE with the conclusion. But such an inference *must* BE *inevitable*, OR IT CAN *not* BE DRAWN" (Burlen v. Shannon, 99 Mass., 200; Lea v. Lea, 93 *Id.*, 493).

It will be urged that the question as to the validity *was necessarily involved in* said decision;

Hence that THAT question is *res adjudicata*.

The position of defendants then would be that Justice Truax *could not have decided who owned* the residue, *without* deciding as to the *validity* of the releases.

That, as he held that *the twenty colleges* owned the residue;

And that the widow and kin did *not* own it;

He therefore *necessarily* decided as to the *validity* of the releases.

But because he held that the twenty colleges owned it, and that the widow and kin did *not* own it;

how does it follow that the widow and kin own after all own it; then released;

And that he held *then* that their releases were *valid?*

Is it not apparent that *before* a Court would consider the *validity of releases* it must be *first* satisfied that the releasors *had something to release?*

If the widow and next-of-kin *did not* own the residue,

Why decide as to the *validity* of releases of *something they never owned?*

Any more than as to the validity of releases of *any other strangers?*"[1]

That would be a *senseless* thing to do.

How could it aid in determining who owned the residue to consider and decide as to the validity of the release of some one who *never* owned it?

From the moment of Mr. Papworthier's death, Justice Truax found that it was held by said three Masterton upon a secret trust *for the 20 Colleges.*

Hence that, *at no moment,* did the widow or next-of-kin *own one dollar of* it. It is unquestioned that this was his position.

Holding *that* view, he wanted *no* time upon their releases of what they did not own. *Why should* he?

Would *Your Honors* do *such* a thing *as that?*

Would *any* sensible, intelligent man?

(I, 222.) Witness Joseph Lewis, testified thus:

3 Q. Were you present with Mr. Blaikie, and other gentlemen in the room of Judge Truax, in the County Court House on the occasion when he announced his decision, after the trial of the case in the State Court? A. Yes, sir.

4 Q. And do you remember a period of the talk, when Mr. Blaikie asked him some question, about 'the issues of the next-of-kin', or something of that kind? A. He asked him about the ladies, and the *releases*.

5 Q. Now, will you state what you remember what Mr. Blaikie asked; and what the Judge *said* about it on *that* occasion? A. Well, after he had read his decision, Mr. Blaikie asked him, "How about the ladies and the releases"?

And he says he considers the $310,000 that the ladies got, WAS THE SAME AS MONEY FOUND.

THAT THEY HAD NO RIGHT TO IT.

That was about the substance."

(I, 514.) Appears the following testimony:

42 Q. Mr. Blaikie, did you attend upon Judge Truax with the other counsel at the time he announced his decision; or read his opinion, and before the decision was actually entered? A. Yes.

43 Q. Where did that take place? A. In the private room of the Justices of the Supreme Court—in the County Court House of this Borough.

44 Q. After you had heard the announcement of his decision, did you address any questions to him in regard to the determination of the claims concerning releases? A. Yes, sir.

45 Q. State what you said to him, and what he said? A. I asked him, "What about the widow and next-of-kin", where did they come in?

He said "I consider that they got $310,000 THAT

THEY HAD NO RIGHT TO. I CONSIDER IT THE SAME AS MONEY FOUND."

The words up to "I consider it the same as money found," I consider *verbatim.* The last clause "*I* consider it the same as money found" I think is *substantially* correct, it may vary a word or two from the way I heard it."

That Justice Truax made the statements just quoted, at the time he announced his decision, *has never been questioned,* although there were upward of 20 of the counsel for defendants in the room standing near, where they could hear every word that he said.

It will thus be seen whether there would have been any sense in his considering and passing upon the *validity* of releases, given by person, *who, he said, had nothing to release.*

Justice Truax's Decision Was Upon a Ground Inconsistent With a Decision as to the Validity of the Releases.

In short the ground upon which Justice Truax decided, WAS INCONSISTENT WITH the ground that the widow and next of kin *ever owned the residue.*

The law in *such* a case is *thus* laid down by the Court of Appeals, in PEOPLE EX REL BRIDGMAN *v.* HALL, 103, N. Y., 177, ANDREWS, J.

"But this concession does not help the defendant in raising an estoppel, unless he can show further, that the judgment *also* determined that the appointment *was for a full term.*

This point the Court expressly refused to decide.

It is sought to be *inferred*, as a necessary sequence to the fact found, *against the express disclaimer*, in the judgment itself.

BUT IT IS A DECISIVE ANSWER TO THE DEFENSE OF RES ADJUDICATA that judgment passed against the relator in that action, ON A GROUND *which is* UTTERLY INCONSISTENT *with an adjudication that Hall's appointment was for a full term.* * * *

"*The most* that the defendant is entitled to claim *is* that the judgment *contains contradictory* AND *inconsistent* IMPLICATIONS.

On *one*, that the appointment of February 7th, 1884, was for a *full* term.

And the *other*, that it was a TEMPORARY appointment ONLY.

Under *this* situation THE MATTER *is set at large*, and the judgment constitntes *no estoppel.*

It comes within the qualifications stated in The Duchess of Kingston's case, that a judgment is *not* conclusive of "*any* matter to be *inferred* by argument from the judgment." It is unnecessary to consider other grounds urged against the conclusiveness of the former adjudication."

Why Judge Wallace Decided as He Did.

But with Judge Truax—the only one who could know—thus *swearing* that he did NOT consider or decide as to the *validity* of said releases.

What did Judge Wallace mean by saying "It is altogether probable, if all the facts which appear in the present had been before the learned Judge who decided the demurrer, he would *not* have reached the conclusion that the former adjudication was *not* a bar to the present suit?"

What was thus *laid before him*, that made him say *that?*

He had the record in Amherst *v.* Ritch;
Our application for the injunction—a very brief statement.
And the Bill itself, in the present case.
And the affidavits and briefs of defendants.
But his decision came down January 7th, 1899.
There had been no amended bill filed *then;*
Nor *until* May 31st, 1899.
No *cross-bill* nor *answer* of the widow's executor, filed until February 9th, 1899.
And no amended Cross-Bill filed until February 20th, 1899.

Hence, the Amended Bill—and the amended Cross-Bill—*were never before the U. S. Circuit Court of Appeals at all.*
Indeed, *that* Court *did not then know; could not* know; and *does not to this day officially know, that there has ever been any cross-bill filed at all.*

Why Judge Lacombe Decided as He Did.

It is not difficult now to see how Judge Lacombe came to decide as he did.
He did it, out of *comity* to the U. S. Circuit Court of Appeals,
But, as already seen, the U. S. Circuit Court of Appeals had before it *only* the record of Amherst *v.* Ritch. The brief application for the injunction; and the briefs of Counsel for defendants and the *affidavits,—not* depositions—of Ritch, Bulkley and Vaughan; all of which briefs and oaths impressed

it upon that Court that Justice Truax HAD considered and decided as to the validity of the releases.

That is what *caused* Judge Wallace to say that Justice TRUAX *had decided* that they *were valid.*

But this Court did not have the Amended Bill and the amended Cross-Bill; and especially and above all the oath of Justice Truax himself, *that he had* NOT *considered and decided* as to that *validity.*

Hence, the case before the United States Circuit Court of Appeals *was* NOT "upon *a precisely similar* state of facts".

The Laws of Comity.

Why was not Judge Lacombe at liberty, then, to decide *as he saw fit?* As to the Pleas to the Bill and Cross-Bill, and their *sufficiency?*

It was a *new* case.

Comity requires respect for the decision of any question in it upon OTHER facts, by the U. S. Circuit Court of Appeals.

BUT THAT DECISION DOES NOT CONTROL.

This question was dealt with in the Second Circuit, in Hale *v.* Hilliker, 109 Fed., 273, By COXE, J.:

"A decent and orderly administration of the law requires that, where a question had been decided by a Circuit Court of Appeals, the Circuit Court shall follow that decision;

When the same question is presented, UPON A PRECISELY SIMILAR STATE OF FACTS.

But here the case before the U. S. Circuit Court of Appeals was *not* the same as that before Judge Lacombe.

But, although he met the requirements of comity by deferring to the decree of that Court ;

He did not do so *blindly.*

He does not do things in that way.

He *saw* the situation.

And has placed upon record *what he thought of it.*

In words which will clear away all doubt as to where he stood.

And *as to whether he agreed with* Judges Wallace and Shipman, sitting as the U. S. Circuit Court of Appeals ;

Or with Judge Wheeler in overruling the demurrers ;

In his opinion, after saying that he finds the Pleas sound and supported by the proofs ;

Judge Lacombe *tells why—he so holds*, in one of the most unusual statements ever made in an opinion, purporting *to agree with* another opinion.

A Decision under CONSTRAINT.

He says :

"IT IS CONSTRAINED so to hold, the decision of the Circuit Court of Appeals, upon appeal from the order of *injunction*

This sentence will *remove* any doubt,—*if anyone ever had any doubt*,—as to whether Judge Lacombe *was giving his own opinion ;*

Or respectfully *following* one with which *he did not agree.*

"Reasoning" "Difficult to Follow".

His next sentence shed *even more light* upon *his*

position. He says (I. 260) "IT MAY BE DIFFICULT TO FOLLOW THE REASONING, by which that Court reached the conclusion THAT THERE HAD BEEN *an adjudication, sustaining the proposition* that *the releases*, executed by the widow and next-of-kin WERE VALID;

And NOT procured by fraud;

But THAT CONCLUSION *was certainly reached*; and was *expressed with no uncertain sound.*

If this is not a respectful, *yet unmistakable way*, of putting upon record *that he does* NOT *agree with the reasoning of* Judge Wallace,—just what *would* be?

He points out that *Judge Wallace*—NOT he—*says* that there *was* an adjudication,—that the releases WERE VALID.

When as already seen—by Justice Truax's own oath; THERE WAS NOTHING OF THE SORT.

And it is inconceivable that Judge Wallace would have said so had he known the truth.

A Remarkable Statement.

But Judge Lacombe's next sentence is a striking one.

It puts in a nut-shell just where *he* stands, in this litigation. It reads thus:-

"No doubt the ultimate result of the litigation in the State Courts, *has been* BY REFINED TECHNICALITIES *to render* INOPERATIVE, *so far as* THIS *estate is concerned*, the provisions of a statute, which seems to be the conception, of a wise and commendable public policy."

In all Your Honors' vast range of legal and judicial experience, have you ever before seen a

Judge assenting to, and following, the decision of another Court in *this* manner-? Pointing out, in terse, meaningful words, *that the entire set of State Courts has succeeded* IN SUBVERTING *a wise and commendable law?*

If, in forming your opinion as to this case, you will bear *this single sentence* so clearly in mind, that you will known *the pith of it* by heart;

It will stand out like a beacon-light, helping to find the course to a just and right decision.

If you forget *all the other* words, there are *three* here that tell the story, namely.-" BY REFINED TECHNICALITIES."

See if THAT is not the way the present holders of this residue *have obtained it.*

And have *retained* it.

But down comes the interference with his free untrammeled judgment.

Like Paul's "*except these bonds*", he said "*Except for Judge Wallace's conclusion*";

Difficult as it may be *to follow* His REASONING—

Which *means* that he *did* NOT *follow it;*
That he *did* NOT *agree with it.*

The Law as to a Miscarriage of Justice.

But that conclusion, he must *obey.*

Listen to his *saying so—this* time in Judge Wallace's *own* words, thus. After stating "That circumstance, however, *is immaterial*", as the Court of Appeals expresses it,

"Even if there *had been* A MISCARRIAGE *of justice* (The parties), MUST SUBMIT."

The *last two* words *tell the story*, "MUST SUBMIT".

Are *these* words of a Judge—*stating* HIS OWN *judgment?*
Or of one, *shackled by superior force?*

Of what value is the judgment of a Court, *when it is* NOT *that Court's judgment at* ALL?
But when that Court *is a mere echo of* someone else, with whom *it does* NOT *agree for a moment?*

Has it come to this, in our Courts, that "*Even if there has been* A MISCARRIAGE *of justice*, the parties *must submit?*"
Is there any NEED OF any such *submission?*

What REASON does Judge Wallace give for a *Court of Justice* instead of doing justice, doing just the opposite supplying, *and being content with a* MISCARRIAGE *of it?*
Where does he find *authority for* this?
Is it in *these* words—whereby the founders of this Nation—the very *first* thing they did, after guarding the nation's *life* itself, provided that;
"We the People of the United States, *in order* to form a more perfect union, TO ESTABLISH JUSTICE"?
Is *this* what the American People look *to our Courts to supply?*
Is *this* what has given our Courts, and above ALL, *this* Court, its vast weight and influence;
Not in *this* land alone, but in *every* civilized nation upon the face of the earth?
Is it because, instead of finding, and doing *justice;*
It *tamely submits to* "REFINED TECHNICALITIES"?

And is content with *not* doing justice; but with *its miscarriage?*

If *these* are to decide the ownership of property,
Why should not the Constitution *be amended*, so as to read:

"*To establish* TECHNICALITY?"

Then people *would know what to expect.*

It is indeed, as Judge Wallace's maxim says, for the interest of the Republic that there should be *an end of* litigation, but it is of far *higher* importance, to fix the stage of the proceedings, *at which* it shall *end.*

Shall it be when the trial Judge comes and swears "I *never tried* your case?"
I never considered the hinge question in it?
To be sure I was *mistaken;*
And thought that you owned nothing. When you did own the whole residue. But as I thought so, of course it was *idle* for me to try *the validity of* your releases *of nothing.* And *I never did it.*
Is that the stage of proceedings, where the law meant *to have a suit end?*

Which is *more important*, an end—OF LAW SUITS?
Or an end—of JUSTICE?

When and Where Had the Widow and Kin a Hearing?

When the trial Judge *swears that he did not consider or decide*, as to the releases?

Wherein lies the difference between *so* disposing of *the rights of* the widow and next of kin,—

And cutting them off, WITHOUT A HEARING?

Ever since law was known,—

What Court, worthy of the name of Court,—EVER held that a man could be condemned *without a* hearing?

Nearly 1,900 years ago,—when such a thing was threatened to the Founder of our religion,—

A member of a great Court,—a learned Rabbi of the Sanhedrim, asked,

(John vii, 51.)

"Doth our law *judge* any man BEFORE it HEAR him; and KNOW what he DOETH?

This Court, adopting *the same* principle, as it has always done,—said in Hovey *v.* Elliott, 167 U. S., 415, by White, J.:

"This language but in effect expresses *the most elementary conception of the judicial function.*

At common law, *no man was condemned without being afforded an opportunity to be heard*".

417. "Can it be doubted that DUE PROCESS OF LAW SIGNIFIES A RIGHT TO BE HEARD IN ONE'S DEFENSE?" * * *

P. 446. "*There is no distinction in principle* between determining a cause *upon issues not raised* by the pleadings, in the actual absence of the party;

And rendering a decision BY REFUSING TO PERMIT A DEFENDANT TO BE HEARD IN HIS DEFENSE;

OR TO CONSIDER THE MERITS OF A SUFFICIENT DEFENSE."

But did not Judge Lacombe carry the doctrine of comity further than he needed to?

FIRST POINT.

The Circuit Court was free to decide this case upon the merits, according to its own convictions.

Comity always deserves respect. BUT IT IS NOT LAW. If it *was*, and the *first* Court to deal with a question made a mistake, all succeeding Courts dealing with that question—certainly upon the same state of facts—must make *the same* mistake—and so *spread*, instead *of end*, the harm done by it.

The rule for the guidance of our Courts in such a situation is laid down by this Court as follows :

Mast, Foos & Co. *vs.* Stover Mfg. Co. (Oct. Term, 1899), 177 U. S., 483, BROWN, J. :

> "We think the plaintiff overstates somewhat the claims of comity.
>
> "Comity is not a rule of law, but one of practice, convenience, and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated legislation of the same question.
>
> "BUT ITS OBLIGATION IS NOT IMPERATIVE. If it were, the indiscreet action of one Court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an *unsound* principle.
>
> "Comity persuades, BUT IT DOES NOT COMMAND.

"It declares, not how a case shall be decided, but how it may with propriety be decided. It recognizes the fact that THE PRIMARY DUTY OF EVERY COURT is to dispose of cases according to the law AND THE FACTS; in a word—TO DECIDE THEM RIGHT.

"In doing so, THE JUDGE IS BOUND TO DETERMINE THEM ACCORDING TO HIS OWN CONVICTIONS. IF HE BE CLEAR IN THOSE CONVICTIONS, HE SHOULD FOLLOW THEM.

"It is only in cases where, in his own mind, there may be a doubt as to the soundness of views, that comity comes in play, and suggests a uniformity of ruling to avoid confusion, until a higher Court has settled the law.

"IT DEMANDS OF NO ONE THAT HE SHALL ABDICATE HIS INDIVIDUAL JUDGMENT; but only that deference shall be paid to the judgment of other co-ordinate tribunals.

"CLEARLY IT APPLIES ONLY TO QUESTIONS WHICH HAVE BEEN ACTUALLY DECIDED, AND WHICH ARISE UNDER THE SAME FACTS.

SECOND POINT.

The interlocutory decision of the Circuit Court of Appeals, reversing the injunction order has not the weight of a decision of the whole cause upon the merits; and is not *res adjudicata*, or controlling at final hearing.

Such a decision *does not purport to be final*; but *was merely* partial and provisional, upon *such facts as* had been *presented to the Court at a preliminary stage* of the cause, to say whether, in the exercise of the Court's discretion, injunction had better issue.

Leyman Ice Company *vs.* Martin, 109 U. S., 22, BLATCHFORD, *J.*:

"The decree is not final, because it does not dispose of the *entire controversy* between the parties."

1 Freeman on *Judgments* (Fourth Edition), Section 251:

"No question becomes *res adjudicata* until it is settled by a *FINAL* judgment. * * *

"The rule upon this subject, and the grounds upon which it is based are well stated by Pothier. He says:

"'A judgment to have the authority, or even the name of *res adjudicata*, must be a definite judgment of condemnation or dismissal.

"'A *provisional* condemnation then cannot have either the name or the authority of *res adjudicata*; for although it gives the party obtaining it a right

to compel the opposite party to pay, or deliver *provisionally*, the money or things demanded, IT DOES NOT PUT AN END TO THE CAUSE, OR FORM A PRESUMPTION JURIS DE JURE that what is ordered to be paid or delivered IS DUE; SINCE the party condemned MAY BE ADMITTED IN THE PRINCIPAL CAUSE, TO PROVE that what he was ordered to pay was *not* due; and consequently to obtain *a recession* of the judgment."

Pothier on Obligations, Pt. 4. C. 3, Sec. 3, Art. 1.

Webb *vs.* Buckalew, 82 N. Y., 559, FINCH, J.

"Where * * * an actual decision upon the *merits* has not been reached * * * THE PROCEEDINGS HAVE *no* CONCLUSIVE CHARACTER, AND CANNOT OPERATE AS A BAR. (Cites cases.)

"It is therefore *only a final judgment* UPON THE MERITS which prevents *further* contest upon *the same issue.* * * * Until *final* judgment is reached, THE PROCEEDINGS ARE SUBJECT TO CHANGE AND MODIFICATION; ARE IMPERFECT AND INCHOATE, AND CAN AVAIL NOTHING AS A BAR OR AS EVIDENCE until the judgment, with its verity as a record, settles finally and conclusively the question at issue."

"AN INTERLOCUTORY ORDER IN *not* SUCH A JUDGMENT. *It is not a judgment at all.* * * * Until the *judgment* comes, NO MAN CAN KNOW *what* THE ULTIMATE DECISION WILL BE.

Mast, Foos & Co., *vs.* Stover Mfg. Co., 177 U. S., 489 (Oct. Term, 1899), BROWN, J.:

"If a prior adjudication has FOLLOWED A FINAL

hearing upon pleadings and proofs, especially AFTER a protracted litigation, GREATER WEIGHT SHOULD BE GIVEN TO IT *than if it were made upon a motion for a preliminary injunction.* These are substantially the views embodied in a number of well considered cases in the Circuit Courts and Circuit Courts of Appeals (cites them) * * *

(Page 494.) "The case in the Eighth Circuit was evidently decided UPON A WHOLLY INCOMPLETE SHOWING ON THE PART OF THE DEFENDANT.

"3. One of the principal questions pressed upon our attention related to the POWER of the Court of Appeals to order the dismissal of the Bill BEFORE answer filed, or proof taken, upon an appeal from an order granting a temporary injunction.

"THIS QUESTION IS NOT NECESSARILY CONCLUDED by Smith *vs.* Vulcan Iron Works, 165 U. S., 518, since in that case, the interlocutory injunction was granted, AFTER ANSWER AND REPLICATION FILED, A FULL HEARING HAD UPON PLEADINGS AND PROOFS, and an interlocutory degree entered, adjudging the validity of the patent, the infringement and injunction, and a reference of the case to a master to take an account of profits and damages.

"In that case we held that, if the Appellate Court were of opinion that the plaintiff was not entitled to an injunction because his bill was devoid of equity, such Court might, to save the parties from further litigation, proceed to consider and decide the case upon its merits, and direct a final decree dismissing the bill.

"*Does this doctrine apply* to a case where a temporary injunction is granted PENDENTE LITE UPON AFFIDAVITS, AND IMMEDIATELY UPON THE FILING OF A BILL?

(Substantially as at bar.)

"WE ARE OF OPINION THAT THIS MUST BE DETERMINED FROM THE CIRCUMSTANCES OF THE PARTICULAR CASE. If the showing made by the plaintiff BE INCOMPLETE; if the order for the injunction be reversed, because injunction was not the proper remedy, or because under the particular circumstances of the case it should not have been granted; OR IF OTHER RELIEF BE POSSIBLE, NOTWITHSTANDING THE INJUNCTION BE REFUSED, THEN CLEARLY THE CASE SHOULD BE REMANDED FOR A FULL HEARING UPON PLEADINGS AND PROOFS. * * *

Ordinarily, if the case involve a question of fact, as of anticipation or infringement, WE THINK THE PARTIES *are entitled to put in their evidence* in the manner prescribed by the rules of this Court for taking testimony in equity cases."

At bar, the Circuit Court of Appeals recognized this; and so the evidence has been put in since.

Snow *vs.* Sargent *et al.*, 106 Fed. 232, TOWNSEND, J.:

"The legislative branch of the Government has recently indicated its DISAPPROVAL OF THE PRACTICE OF DISPOSING OF CASES *on affidavits*, BY TAKING AWAY THE RIGHT OF APPEAL from an unsuccessful complainant on a petition for a preliminary injunction."

1. High on Injunctions (3d Edition), Section 5:

"It is to be constantly borne in mind that, in granting temporary relief by interlocutory injunction, COURTS OF EQUITY *in no manner anticipate* THE *ultimate* DETERMINATION OF THE QUESTIONS OF RIGHT INVOLVED.

They *merely* recognize that a sufficient cause has been made out to warrant the preservation of the

property or rights in issue *in statu quo*, *until* A HEARING UPON THE MERITS; WITHOUT EXPRESSING, AND WITHOUT HAVING THE MEANS OF FORMING A FINAL OPINION AS TO SUCH RIGHTS.

* * * "*Nor* is the decision of the Court in granting *or refusing* a preliminary injunction *conclusive upon either* OF THE PARTIES ON THE *subsequent* DISPOSITION OF THE CAUSE BY *final decree.*"

Andrea *vs.* Redfield, 12 Blatchford, 425.

(Before Woodruff and Wallace, JJ.)

WOODRUFF, J.:

"But the granting of a preliminary *injunction* has for its precise object the retaining of all things in their *then* condition, UNTIL THE CASE CAN BE DELIBERATELY HEARD OR EXAMINED UPON THE ISSUE FINALLY MADE FOR HEARING OR TRIAL. IT IS PROVISIONAL MERELY. It is granted as a matter of discretion. It is often, and properly granted, where the question is important and doubtful.

"WHEN THE CASE COMES TO BE FINALLY HEARD ON THE MERITS, and judgment is to be pronounced, the Court are bound TO APPLY TO IT THE RULES THAT GOVERN THE RIGHTS OF THE PARTIES; and there is nothing provisional in such judgment. They *then* finally settle those rights. * * *

"DECISIONS OF THE COURT, granting or *refusing* a preliminary injunction ARE NOT CONCLUSIVE EITHER UPON THE COURT OR THE PARTIES, AND ARE NOT INTENDED TO BE SO IN A SUBSEQUENT DISPOSITION OF THE CAUSE BY DECREE.

"We are not therefore wanting in due respect to the Court or the Judge by whom the preliminary injunction was granted. On the contrary, our convictions tend to the belief that, if sitting

with us on the hearing of this demnrrer, his conclusion must be the same as our own deliberate judgment."

Cited with approval in California Fig Syrup Company *vs.* Putnam, 66 Fed., 754, by Colt, C. J.; and in McLure *vs.* Sherman *et al.*, 70 Fed., 190, by Knowles, P. J.

If, then, such an incidental and inconclusive decision as Pothier says, (*supra*) "DOES NOT PUT AN END TO THE CAUSE.

OR FORM A PRESUMPTION *juris de jure* that what is ordered to be paid or delivered is due, since the party condemned MAY BE ADMITTED IN THE PRINCIPAL CAUSE TO PROVE that what he was ordered to pay was NOT due, and consequently to obtain A REVERSION OF THE JUDGMENT;

How *can* he obtain such a reversion upon *final* hearing if this *wayside* decree *is* final and conclusive?

Or if it is *not* open to the Court which holds the final hearing to, if it should,—award him such REVERSION OF THE JUDGMENT?"

Where is the sense of saying that, notwithstanding such *interlocntory* holding, *he* "*may be* admitted in the principal cause to prove that what he was ordered to pay was *not* due", *if in the same breath, he is told that that hearing is final*, and fatal to his rights at a full hearing upon the merits?

If after a temporary injunction, *pendente lite*, "the parties are entitled (as the Supreme Court says in the Mast, Foos case, *supra*) to put in their evidence,—*what good will it do to put in the evidence, if the case or question has already been decided*"?

If, as Judge Finch says in Webb *vs.* Buckalew (*supra*): "It is ONLY a final judgment UPON THE MERITS 'which prevents further contest upon the same issue',

If until *final* judgment is reached, THE PROCEEDINGS ARE SUBJECT TO CHANGE AND MODIFICATION;

ARE IMPERFECT AND INCHOATE, AND CAN AVAIL NOTHING AS A BAR;

OR AS EVIDENCE, until the judgment * * * settles finally and conclusively the questions at issue;

If, as he says, "AN INTERLOCUTORY ORDER IS NOT SUCH A JUDGMENT, IT IS NOT A JUDGMENT AT ALL!"

Why should the *interlocutory* order at bar be *an exception to* the rule, and prevent such *final* and conclusive judgment upon all the issues?

If, as High says (*supra*), they reach such inter locutory decree, as they did at bar, WITHOUT HAVING THE MEANS OF FORMING A FINAL OPINION AS TO SUCH RIGHTS; and those means are fully and with great care, laid before the Court at *final* hearing;

Upon what principle, or why, should not the final decree result from, and rest upon *all* the proofs, instead of upon a few scattering statements in affidavit and argument--with *no* opportunity *to cross examine* the affiants--*before* the cause was even *at issue?*

If again, as High says (*supra*), "In granting temporary relief by interlocutory injunction, *Courts of Equity in no manner anticipate the ultimate determination of the questions of right involved;* upon what theory or reason is this cause an exception to that salutary, established and just rule?

If, for more than quarter of a century, the law as laid down above by Judges Woodruff and Wallace, has stood undisturbed, that decisions of the Court granting or refusing a preliminary injunction ARE NOT CONCLUSIVE EITHER UPON THE COURT OR UPON THE PARTIES, AND ARE NOT INTENDED TO BE SO IN A SUBSEQUENT DISPOSITION OF THE CAUSE BY A DECREE;

Why should such a passing order, upon concededly *inperfect* proof, stand in the way now of such a *substantial* disposition of the cause upon *full* proof (with *every* opportunity *of cross examination*), and by *final* decree?

Because *one* set of Courts has, "*by refined technicalities*, as to *this* estate, rendered *inoperative* the provisions of a Statute which seems to be the conception of a *wise* and *commendable* public policy;" was *that* the reason for asking another special decision as to this estate, different from any ever known in our Courts, or likely to again be?

May not your Honors say with grace to the Judges of the Circuit Court of Appeals, as one of them said above in Andrea *v.* Redfield, "our convictions tend to the belief that, in sitting with us on the 'final hearing of this entire cause,' your conclusion must be the same as our own deliberate judgment?"

Indeed, how could it be otherwise?

The chief question on the appeal was—Did Justice Truax consider and decide as to the validity of the releases,—upon what was before it,—that Court held that he had so considered and decided.

But he now swears that he did NEITHER. AND NO ONE NOW CONTRADICTS HIM.

The Circuit Court of Appeals has never passed upon the questions of res adjudicata and due process of law upon the facts now before this Court.

Defendants claim that the Circuit Court of Appeals has decided,

(1.) That the widow and next-of-kin have *not* been deprived of their property without due process of law.

(2.) That the decision of the State Courts in Trustees of Amherst College *et al. vs.* Ritch *et als. is res adjudicata* and a bar to the present suit.

But was the decision of the Circuit Court of Appeals "UPON A PRECISELY SIMILAR STATE OF FACTS"?

Upon the *same* facts, *and no others*, that are before Your Honors now?

What facts were before *that* Court?

As already seen for complainants, such as appear in their Bill of Complaint, and three short sentences from the opinion of Justice TRUAX at Trial Term.

For defendants, such as appeared in affidavits of Messrs. Putney, Bulkley and Vaughan, and as were urged by counsel for defendants, by their arguments and briefs.

That Court thus had before it the Bill of Complaint of two ladies living *in Iowa*, 'who had *not* attended the trial,' and *could not* know what took place there *save by hearsay*, saying that Justice Truax *had not considered or decided* as to the *validity* of their releases.

And, upon the *other* hand, the *oaths* of three men, Messrs. Putney, Bulkley and Vaughan, and the statement of Mr. Bishop, all four of whom had attended and taken active part in the trial before Justice Truax, averring *unequivocally* that Justice Truax *had considered and passed upon* that *validity.*

With such *a preponderance of* evidence of *four actual witnesses of* the trial, against that of *only two* persons, *neither of whom was there*, or had *any direct* knowledge of what took place there; with *two* of said men going further, and swearing upon information and belief that the Supreme Court *did* determine not simply as to that validity, but

"*did* determine that the said releases * * * WERE VALID;"

and so leading that Court to believe that Justice Truax *had* so determined;

"with not only Mr. Bishop, but the counsel of *every* appealing defendant, thoroughly acquainted with the facts, *unhesitatingly assuring that Circuit Court of Appeals* that Justice Truax *did* indeed *consider and decide* the issue as to the *validity* of said releases;

Upon that state of facts, and that volume of assurance and of agreement, was it not natural for that Court to find that Justice Truax had considered and passed upon the *validity*—or invalidity—of said releases?

Then, why should not *that* decision *control now?*

Your Honors will observe, in passing, as already stated, that *that* decision of the Circuit Court of Appeals came down January 7th, 1899;

That there had been *no* amended bill filed *then*, nor until May 31st, 1899;

No cross-bill nor answer of the widow filed *till February* 9th, 1899;

And no *amended cross-bill* filed *until* February 20th, 1899.

Hence, that the amended bill, and the amended cross-bill *had not been before the Circuit Court of Appeals* when it reached said decision!

Were never before that court at all;

And that *that* court did not then know, *could not* know, *and does not* to this day officially know, that there has *ever* been any cross-bill filed.

Said Circuit Court of Appeals had before it

Complainants' Proofs as follows:

"Upon the trial of said action * * * said court * * * made and rendered its decision *without considering, passing upon* or including in its judgment the said issues, and omitted to decide upon these complainants' rights to the affirmative relief by said answer prayed in respect to said releases" (See bill, fol. 21).

Complainants' counsel also quoted these passages from Justice

The record in Amherst *v.* Ritch.—*Defendants' Proofs* there included affidavits of Messrs. Putney, Bulkley and Vaughan, and the arguments and briefs of counsel.

Mr. Putney swore thus: August 10th, 1898, page 205,

"*The precise question* which they raise and right which they assert in the bill of complaint herein was litigated by them, AND WAS DULY ADJUDGED IN SAID COURT."

Truax's opinin, namely, (Complainants' Appendix of Exhibits, fol. 99),

"The view that I have taken of the facts and the law of this case renders it unnecessary for me to consider the very interesting questions of law propounded by the learned counsel for the defendants Reynolds, Achter and Fayerweather."

(Folio 97.) "But, in any event, the Northwestern University is entitled to take, because the legatees mentioned in the ninth clause of the will, who are the ONLY survivors, in the view that I have taken of the law of this case, interested in its not taking, consents to its taking."

* * *

"In the view I have taken of the law of the case, that payment was made from the fund, that belongs to those institutions ALONE."

As the precise question was the *validity* and Justice Truax swore that he had *never* adjudged it, how came Mr. Putney to swear that it was duly adjudged in that Court?

If he meant only in General Term and not at the Trial Term also, why did he not *say* so?

Why is not the material meaning of his words exactly the *other way?*

Messrs. Bulkley and Vaughan each swore, August 9th, 1898, as follows (page 253):

"As I am advised and believe, the said Supreme Court *did* adjudge and did determine that the said releases referred to in the bill were valid, and that the complainants herein were not entitled to any relief in respect thereto."

Will their counsel, Mr. Parsons, state to this Court *who* so advised them and *by what authority?*

The brief of Mr. James L. Bishop in behalf of the Trustees of Amherst

College and others, defendants-appellants, says:

Page 22, "All that the decision of the demurrer can properly be said to establish is that the allegations of the complaint present a cause of action, and that the bill alleges that the judgment of the Supreme Court was not obtained *by due process of law.*"

Page 8, "The complainants refer to the opinion of Mr. Justice Truax, and from its language they argue that he regarded the issue as to the validity of the releases to be immaterial."

The rule is well settled in New York that the Court CANNOT look at the *opinion* of the Judge for the reasons and grounds of the decision which he pronounces. Snebley *vs.* Conner, 78 N. Y., 218.

Laning *vs.* Railway Co., 14 N. Y., 539.

Shute *vs.* Jones, 78 Hun, 99.

And the same rule applies in this Court.

Martin *vs.* Evans, 36 L. R. A., 218.

Laird *vs.* City of De Soto, 32 Fed., 652.

"If, however, Justice

Truax's opinion is examined, it will be found that *he nowhere states or intimates* that he had *not* decided the question as to the validity of the releases. The opinion contains the following statement: "The view that I have taken of the facts and the law in this case renders it unnecessary for me to consider the very interesting questions of law propounded by the learned counsel for the defendants Reynolds, Salter and Farnsworth."

No inference can be drawn from this language that he did *not* find that the releases were not in all respects valid.

"Having decided the cause in favor of the plaintiffs, and having presented a sufficient ground on which to rest his decision, he says that it was unnecessary to consider the interesting questions of law presented by the defendants, the claimants here.

"This expression means *nothing more than* that the judge did not consider it incumbent upon him to discuss

those questions of law in an opinion.

"There is not the slightest intimation that he did not give the arguments of counsel for the same full judicial consideration.

"*Still less is there any intimation that he did not consider and determine upon every question of fact presented.*"

Read those statements in the light of Justice Evans's oath—and *say* whether they were calculated to present to Judge Wallace the true situation—or not.

The position pressed upon the Circuit Court of Appeals by the defendants was true, plain and unmistakable.

The issue was narrow.

It was this. *Was, or was not, the activities of the witnesses considered and decided by the Trial Judge, Justice Evans?*

The thing thus urged so forcibly upon that Court by many oaths, arguments, and briefs, was that he *did* consider and decide that issue.

Was it [illegible] before Judge Lacombe to that which was before Judge Wallace?

Have you now only Messrs. Purves, Dobbins and Vaughan swearing that he *did* consider and decide said issue?

And Messrs. Bishop, Root and others *construing* the opinion, and *urging by argument and brief* that he *had*, indeed, considered, decided, aud forever set *that* issue at rest?

You *have* that, and far more to the same effect, plea upon plea, and brief upon brief, saying over and over that he *had* so considered and decided.

But what is the question to be settled now?

Is it *not*, whether said affidavits and arguments *said* that he did; but whether Justice Truax DID or *did not* do a certain act, namely, *consider and decide that single issue.*

What does *consider* mean?

The Century Dictionary defines it thus:

> "CONSIDER", to look at closely; observe; meditate. TO FIX THE MIND UPON WITH A VIEW TO CAREFUL EXAMINATION; PONDER; STUDY; MEDITATE UPON; TO THINK OR REFLECT UPON WITH CARE.

Webster's International Dictionary (Ed. of 1900), says:

> "CONSIDER", TO FIX THE MIND ON WITH A VIEW TO A CAREFUL EXAMINATION; to think on, WITH CARE. To ponder, study, MEDITATE ON. To look at attentively; TO TAKE INTO VIEW OR ACCOUNT; to pay DUE attention to.

The Century Dictionary says (*supra*), that

> "Consider" means "ponder". What does "ponder" mean? The same dictionary says: "TO WEIGH CAREFULLY IN THE MIND. CONSIDER CAREFULLY.
> *Ponderare*, to weigh."

Did Justice Truax then "fix his mind upon this issue with a view to careful examination?"

Did he make such "careful examination" of it?

Did he "meditate upon" it? Did he "reflect upon it with care"?

Did he "pay due attention to" it?

Did he "ponder" it?

Did he "consider it carefully"?

The inquiry is one, not as to the visible, audible or tangible working of the human body, or of some part of it, which others could see or hear.

But of the *mind* a *mental* operation of a *single* individual.

Such operations are invisible. The *result* of them others may find out.

But the actual mental working, but *one* person knows, or *can* know, whether his mind does specified work or not.

He alone of *all* the world can be conscious of *that identical piece of work.*

That person in this instance *is Justice Truax.*

He ought to know; he of all men alone *does* know whether his mind did the work in question; *did* ponder; *did* reflect upon with care; *did* pay due attention to the issue as to that validity *or not.*

We did not call him *before* said decision was made, because it is an unusual thing to ask a Judge to testify to his judicial acts, and his reasons for them; and we had thought it uncalled for, and out of place to do so, when we had his words in the *opinion*, informing us upon the subject.

And because, until the argument there, we had no reason to think that his opinion *would be dis-*

torted, or taken to mean *the opposite of* what it said;

And because *the regular place* to put in *proofs* is *at final hearing*.

But when *a construction* was put upon his words directly *the opposite of* their natural and ordinary meaning, and the truth was thus so *obscured* that injustice was enabled to succeed;

And when the Court was told *that it had no right to know* what he did say in his *opinion*, and the *new* law had left out the findings which formerly would have told, *and put nothing in their place*,—it was time to get at *the truth*. And we *called* him.

That Court had been told, apparently recklessly, under oath, by men who did *not* know *whether he had or not*, that he HAD considered the releases;

And had decided that they *were valid*.

And the Circuit Court of Appeals then *believed* that Justice Truax *had* considered and decided as to that validity.

And said that

"It is altogether probable that, if all the facts which appear in the present record had been before the learned Judge who decided the demurrer, he would *not* have reached the conclusion that the former adjudication was *not* a bar to the present suit."

In other words, they believed that Judge Wheeler also, had he heard *these oaths and arguments*, that Judge Truax *did* consider and decide as to that validity, would have agreed with them.

Perhaps he *would* have done so.

But Judge Wheeler has a keen scent *for the truth;* and when on its trail, is a difficult man to shake off, until he finds it.

If, *after* the decision of the Circuit Court of Appeals, Judge Wheeler believed that Judge Truax *had* considered and decided as to that validity;

And Justice Truax then had come before him and *sworn* directly and clearly *that he had never done anything of the sort;*

That, as *he* viewed the matter, these ladies *never had anything* to release;

And that hence he had *not* considered and decided as to the validity of their releases of *nothing;*

And no shred or syllable of proof has ever been hinted at since that he was mistaken or wrong;

What would Judge Wheeler have done *then?*

What would Judge Wallace have done *then?*

What would *any other honest man*, acquainted with the facts, *have done then?*

He would have said, what it always takes moral courage to say, "*I was mistaken.*"

"With such light *as I had*, I thought that Justice Truax *had* considered and decided as to the validity of the releases, *and I said so.*

But now *he* swears unhesitatingly that he had NOT.

And with every opportunity, *no one* pretends to hint *now* that he *had.*

And I see that *I was misled.*

And that *the fact is* that he did *not* consider nor decide as to the *validity* or invalidity of said releases at all.

And I so find.

Indeed, *I have no right to find* in any *other* way."

Was Justice Truax before the Circuit Court of Appeals?

Did *he* there, *or anywhere before that*, swear, so that it was brought to the attention of that Court, that he had NOT so considered or decided?

No.

Then how could *that* Court *know* it, especially *when told so positively and persistently*, that he HAD so considered and decided?

And if the fact that he had *not at all* done so, and his own sworn statement that he had not, were *never* before *that* tribunal, *or brought to its attention;*

And upon whether he *did* so consider and decide depends the question whether there is *res adjudicata* or not; and they decided upon *other* facts, and *without* ever having heard him so testify: or *any* proof from *any* source that he ever *had* so testified; and, *since* that decision he *has* so testified, here, fully and clearly——

Was the same question, which is now before this Court, presented to the Circuit Court of Appeals '*upon a precisely similar state of facts*" to that now presented?

Or upon a *different*, *contrary* and *opposite* state of facts?

If, as we have seen, the law is, that, where a question has been decided by a Circuit Court of Appeals, the Circuit Courts shall follow that decision;

When the *same* question is presented "*upon a*

precisely similar state of facts," and the natural and fair implication therefrom is that the Circuit Court shall so follow ONLY when it is presented upon "a precisely similar state of facts ;

And here is a question upon *a diametrically opposite* state of facts ;

Does it take long to tell what to do ?

To see that *that* decision, upon *other* and *different* facts, *could no longer stand*, with *the only witness in the world who knew* and *can tell* what the *real* fact was, *swearing promptly and clearly that he neither considered nor decided as to that validity :* but that he so decided the cause *upon another principle*, in a way that gave the widow and kin *nothing* to release, and that made any money that they got for releasing *the same as money found ;*

Does it take long to tell *now* what to do ?

And *what* does he swear that he *did?*

(Page 522, folio 1044, of Complainants' Proofs). He was asked by Mr. Sherman as follows :

Q. In your opinion you used this language, "The view that I have taken of the facts and the law of this case renders it unnecessary for me to consider the very interesting questions of law propounded by the learned counsel for the defendants Reynolds, Achter and Fayerweather ? *Is that language* in the opinion *intended to express the idea* that you did NOT *consider and decide* either the law or the facts in relation to the *validity* of the releases? A. I think that THAT *should be the view above ;* or the view *I stated above*, that I HAD taken. Won't you repeat the question ?

(Question No. 4 repeated by stenographer).

A. "As I remember now the heirs, Reynolds, Achter and Fayerweather sought to set aside certain releases, on the ground that those releases had been obtained from them by fraud or deceit; and one of the principal claims made, one of the principal evidences of fraud, was the gross inadequacy of the consideration.

"UNDER MY VIEW OF THE LAW THEY GOT $310,000 for NOTHING. THEY DID NOT HAVE ANYTHING TO RELEASE, and NOT having anything to release THEY GOT MORE THAN THEY WERE ENTITLED TO, WHEN THEY GOT THE $310,000.

"SO IT WAS UNNECESSARY FOR ME TO CONSIDER, AS I THOUGHT, ANY OF THE QUESTIONS PROPOUNDED BY THEM. * * *

I THOUGHT THAT THEY HAD NO INTEREST IN THE ESTATE. * * *

"For the reasons that I have stated, because it went either under the deed of trust or the will *to somebody else;* that is, part of it went under the *will*, and another part of it went under *the secret agreement* on the secret trust."

Is this swearing that he DID *consider and decide* as to *the validity of* the releases?

Did he, or did he *not* think that the widow and next-of-kin had anything to release?

That they owned the residue of this estate—or any part of it?

That owning it, they must part with or release it, or, instead of it passing to the twenty colleges or to anyone else, it would still remain theirs?

Here are *his own* words:

"THEY DID NOT HAVE ANYTHING TO RELEASE."

"I THOUGHT THEY HAD NO INTEREST IN THE ESTATE."

If they *did not have anything to release*, why should he go through the idle and senseless ceremony of examining the means used to obtain their releases of NOTHING?

No man of the most ordinary intelligence would have done *that*. He, of unusual intelligence, strong judgment and large judicial experience, in a very busy Court, wasted no time upon *that*.

Indeed he *tells* exactly *why* he did not.

He says "Under my view of the law they got $310,000 FOR NOTHING."

"I THOUGHT THEY HAD NO INTEREST IN THE ESTATE."

What could be *plainer?*

If they *owned* no interest in this estate, nor *anything* in it to release, and they were yet able to get $310,000 for releasing nothing;

What useful end would be served by taking the time of the Court—with other cases pressing for hearing—*to look into the means used* to get them to so release NOTHING?

Was it any part of his *duty* to do so?

It was *unnecessary;* and he *dropped* it.

And he *explains* his view of the law thus: "Because it went either under the deed of trust or the will, TO SOMEBODY ELSE."

If "It went *to somebody else*," it did *not* go *to the widow and next of kin*; was not *theirs;* and *they* had *nothing* to do with it any more than they have with the specific legacies in the ninth clause.

And he specifies just *who* that *somebody else was*, namely, "that is, part of it went under the will."

Namely, besides the small personal bequests that went to the hospitals in the eighth clause of *the will* and to the twenty colleges in the *ninth* clause.

And where did *the remainder* go ?

He states thus :

" And another part of it went under the *secret agreement* or the secret trust."

And that took it *all.*

And what *was* that secret agreement or secret trust ?

Justice Truax himself states in Trustees of Amherst College *vs.* Ritch *et als.*, 10 Misc., 532, where he says :

> " What was the trust on which the defend-
> " ants Bulkley, Ritch and Vaughan held the
> " residuary estate ? It was to carry out the
> " intentions expressed in the will of Mr. Fayer-
> " weather. The only expression of the inten-
> " tion of the testator with regard to the resid-
> " uary estate is contained in the tenth para-
> " graph of his will, and is to the effect that all
> " of his residuary estate shall be divided among
> " the several corporations mentioned in the
> " ninth clause of his will, share and share
> " alike.
>
> " That intention was never changed ; upon
> " the other hand he restored it by the codicil
> " of November 11, 1890. That intention the
> " said defendants were in duty bound to carry
> " out."

And upon the same page, 532, he also said that the residue had *not* gone to the widow and heirs at all, in these words :

"That this trust IS NOT A TESTAMENTARY TRUST, THAT IT IS NOT A TRUST CREATED BY THE WILL, was decided in Olliffe against Wells (*supra*). It seems clear to me that if this trust was not created by the will, it does not come within the prohibition of the Statute of 1860, and that it is a valid trust, and should be carried out by the residuary legatees."

Is any *further* proof *needed* that he believed and held that, to use his own words, "THEY DID NOT HAVE ANYTHING TO RELEASE"?

And that he wasted no time *in considering* if those releases were *valid* or void?

The Decision of the U. S. Circuit Court of Appeals. How it was Reached.

And has the United States Circuit Court of Appeals passed upon the questions of *res adjudicata* and due process of law "UPON A PRECISELY SIMILAR STATE OF FACTS" to that now before this Court?

Had the Circuit Court of Appeals *heard him* give *this* testimony, *would they have said that he* DID *consider and decide* as to the *validity* of the releases?

How COULD they have said so?

What *reasons* do they give why *he must have* so considered and decided as to that validity?

Their opinion says:

"By whatever process of reasoning the result was reached, it is plain that by the judgment of

the State Court it has been determined that the fund now in controversy equitably vested in the various corporations made legatees by the ninth clause of the will, and did not as to any part of it belong to the complainants."

Justice Truax *did* so determine.

But is THAT *enough* to carry title?

Could he not have done that *without looking at* the proof of one or more of the material issues?

If A and B each claimed title to a horse and handed up their proofs to the Judge in sealed envelopes; and later, when he decided that it was A's horse, he said that he did so upon A's proofs, but *had not considered and decided* as to B's at all;

Would not this sentence, quoted from said opinson, be *equally true as to the horse* in the *horse case* as it is to the *fund* in the case *at bar?*

There surely *was* a determination in *each* case—*such as it was.*

"By whatever process of reasoning the result was reached, it is plain that, by the judgment of the court it has been determined that "the horse belongs to A."

B then asks, *How* did you come to *so* hold, *without even looking at my* proofs, or *opening* my envelope containing them?

And he is told, "Oh—as A's proofs satisfied me, it was *unnecessary* to consider yours."

The opinion continues:

"That determination was reached in an action between the same parties now present, brought to settle the ultimate rights of each to the fund."

"As the present suit is brought to determine the

rights of the same parties to the same fund, we are unable to doubt that the former judgment is an estoppel and a finality, not only as to every matter which was offered and received to sustain or defeat the respective claims of the parties of the fund, but also as to any other admissible matter which might have been offered for that purpose."

Hence that it was *res adjudicata.*

Suppose B brought a second suit for the horse, and was told that, as *that* suit was brought to determine the rights of the same parties to the same horse "we are unable to doubt that the former judgment is an estoppel."

Would that be a just and fair trial of B's title to the horse?

Would it be *right* to *deny* him a *second* trial upon *that* ground?

Or, rather, had he really ever had ANY trial?

Yet, have the heirs and widow had any more trial of their rights to that residue than B had of his rights to that horse?

The opinion continues: "In this case, *the fundamental question* in the former suit was whether the parties, other than the present complainants, or the latter, were the equitable owners of the fund in controversy."

So in the horse-case, the fundamental question was whether A or B owned the horse.

The opinion continues: "Moreover, one of the issues *presented* for trial in the former action was whether the releases given by the complainants were operative upon the rights or interests of the several parties in the fund. The plaintiff *set them forth in the complaint* as affecting the rights of the

parties. The present complainants alleged in their *answers* that they were void; and *evidence touching* the circumstances of their execution *was introduced*. That issue was *consequently* in litigation."

So one of the issues presented for trial in the *horse*-case was whether B did not own the horse.

He *pleaded* it, and *offered evidence touching his title*. "*That* issue was *consequently* in litigation."

The opinion says that: "The Trial Term held that the releases were '*without* effect upon the rights of the parties', which would be true, *if* they had *nothing* to release."

So the horse-Court held that B's proofs "*were without effect upon* the rights of the parties."

But is it not plain that *all this* so said in the opinion *could be true in both cases*, yet *without* the widow and kin *at bar*—or B in the *horse*-case—EVER HAVING HAD THEIR ISSUE AND PROOFS CONSIDERED AND DECIDED AT ALL?

Is it not now seen why Judge Lacombe found it "*difficult* to *follow the reasoning*" of that opinion?

The opinion continues: "Even though that decision *was erroneous*, it was final between the parties until reversal."

Final, perhaps, so far. But would it be *right*?

WOULD THE WIDOW AND KIN—OR B—HAVE REALLY EVER HAD ANY TRIAL?

The opinion says: "If it be assumed that the opinion of the Appellate Court should be treated as a reversal of that opinion, and that both of these Courts erroneously held the releases to be valid, these determinations between the parties are final upon that question. Complainants have had their day in Court, before tribunals having jurisdiction to settle their rights, and even if there has been a miscarriage of justice, they must submit. *Interest Rei publicæ ut sit finis litium.*"

Has a party had *a trial* WHEN HIS PROOFS HAVE NEVER BEEN LOOKED AT?

And if he sues again, is his former attempt now *res adjudicata?*

And must he lose his property forever, upon *such* a performance, with the seal upon the envelope containing his proofs *never broken?*

Is it *law* governing either our Federal or State Courts, that when a party presses his pleading and proofs to the best of his ability; and, through no fault of that party, *but wholly through the error of the Judge, a miscarriage of* justice is brought on,—the party is remediless, and must tamely *submit?*

Since *when* was this the law?

Upon what *authority* of principle or precedent?

Where is *the solitary instance of* any *such* law, except at bar?

Would any *other* party to this suit—had he been thus *cut off without having the proofs* of his title, by no fault of his own, but because the judge REFUSED TO *consider and decide them*—would he sit tamely by, and let his property go to others, who have yet to prove that they have *any right to it?*

Is *that* a *trial?* Is, or is not *that, depriving a person of his property without* due process of law?

Will it bring him much comfort to be told that he *has had* his day in court; and that, even if there has been *a miscarriage of* justice, he must submit? That "Interest *Rei publicæ ut sit finis litium?*"

That would be fine Latin, no doubt; but he would be inclined to use *English* at about *that* time of a simpler type, more quickly and widely understood.

Ending law-suits is all right for the public, and a good thing.

But ending them *without ever even looking at a party's proofs*—is *that* a good thing?

What difference is there in principle between *that* and condemning a man *without* a hearing?

Would it much solace B to tell him that, in the words of the opinion:

> "The proposition that their [his] rights have been disposed of *without* due process of law is *too preposterous to merit discussion.* They [He has] have *had* a trial, *according to the settled course of judicial proceeding.* They *have been* heard, and heard *ad libitum*, though *without* avail."

Is it "according to the settled course of judicial proceeding" for the Trial Judge to NOT *consider or decide* the hinge issue in this case?

Without avail, so far, yes. But *have* we been *heard*, when Justice Truax swears in effect that, he NEVER *looked at our* proofs?

B's evidence *was unlooked at*, because the proofs of the other party, A, satisfied the Judge that he did not *need to look at B's*.

And so he *did not* look at it.

Our evidence *was unlooked at* because the proof of the other parties satisfied Justice Truax that he *did not need to look at* ours.

And *so he did not* look at it.

Yet had B *any trial of* his *title* to that *horse?*

And have *we* had any more *trial* than *he* had?

Can property be taken in this way in this country—and with the sanction of our Courts?

and *particularly* of *this* Court?

FOURTH POINT.

The decision in Trustees of Amherst College et al. vs. Ritch et als. is not res adjudicata.

As defendants claim that Justice Truax *did* consider and decide the issue as to the validity of the releases.

Decided that they were valid.

And as they claim that that decision is *res adjudicata*, and an estoppel;

And as we *now* have Justice Truax's own sworn, *uncontradicted* statement that he did NOT consider or determine that issue;

What is the *effect of* his omission *to so consider* and *determine* it?

In Jenkins *vs.* Robinson, L. R., 1 H. L. (Sc. App.), 117, Lord ROMILLY said:

"In my opinion, *res judicata* signifies that the Court *has*, after argument, AND CONSIDERATION, COME TO a decision on a contested matter."

Casparsz on Estoppel by Representation and *Res Adjudicata*, 342: "The decree itself is *not the test* of what is or is not *res adjudicata* * * * *the question is* what the Court DID REALLY DECIDE? *Res adjudicata*, in other words, is matter of *substance!* * * * Where the decree of a Court is *not* based upon a *finding*, BUT IN SPITE OF IT,, SUCH a finding can NOT work an *estoppel*."

Fifield *vs.* Edwards, 39 Mich., 264; COOLEY, J.:

"The estoppel does *not* depend upon *technicalities* (so *Judge Lacombe* thinks), but rests *in broad principles of justice;* and it can apply *only* when the party *has* had his day in court *and an opportunity to establish his claim.* * * * If, for example, the plaintiff, in an action of assumpsit, were to attempt to litigate a matter of trespass to lands, it would be *immaterial* how far he should go into the evidence, or at what stage."

State *vs.* Rusk, 23 Wis., 643:

"A question which was entirely overlooked by counsel AND WHICH WAS NOT EVEN CONSIDERED BY THE COURT, CAN HARDLY BE SAID TO HAVE BEEN SETTLED BY THE DECISION."

The leading case in this Court upon *this* matter, and which has *settled* the law upon the subject, is Russell *v.* Place, 94 U. S., 608.

There Justice FIELD says:

"It is undoubtedly settled law that a judg-

ment of a Court of competent jurisdiction upon a question directly involved in one suit, is conclusive as to THAT question in another suit between the same parties. But to this operation of the judgment *it must appear*, either upon the face of the record, or be shown by *extrinsic* evidence, that *the precise question* was raised AND DETERMINED in the former suit.

"If there be *any uncertainty* on *this* head in the record—as, for example, if it appear that *several* distinct matters *may* have been litigated, upon one or more of which the judgment *may* have passed, WITHOUT INDICATING WHICH OF THEM WAS LITIGATED, AND UPON WHICH THE JUDGMENT WAS RENDERED—THE WHOLE SUBJECT-MATTER OF THE ACTION WILL BE AT LARGE AND OPEN TO A NEW CONTENTION, unless this uncertainty be *removed* by *extrinsic* evidence showing *the precise point* involved *and determined*. To apply the judgment, and give effect to the adjudication ACTUALLY made, when the record leaves the matter *in doubt*, *such* evidence *is admissible*.

"Thus, in the case of the Washington, Alexandria and Georgetown Steam Packing Company *vs.* Sickles, reported in the 24th of Howard, a verdict and judgment for the plaintiff in a trial action against the same defendant on a declaration, containing a *special* count upon a contract, and the *common* counts, was held by this Court, *not to be* conclusive of the existence and validity *of the contract* set forth in the *special* count, *because* the verdict *might have been* rendered WITHOUT REFERENCE TO THAT COUNT, and *only* upon the common counts. *Extrinsic* evidence showing the fact to have been otherwise *was necessary* to render the judgment an estoppel upon those points."

When the same case was before this Court the second time (Packing Company *vs.* Sickles, 5 Wall., 580) the general rule with respect to the conclu-

siveness of a verdict and judgment in a former suit between the same parties, when the judgment is used in pleading, as an estoppel, or is relied upon as evidence, was stated to be substantially this:

> "That to render the judgment conclusive, it *must* appear by the record of the prior suit THAT THE PARTICULAR MATTER SOUGHT TO BE CONCLUDED WAS NECESSARILY TRIED OR DETERMINED—that is, that the verdict in the suit COULD NOT HAVE BEEN RENDERED WITHOUT DECIDING THAT MATTER; or it must be shown by extrinsic evidence that the verdict and judgment *necessarily* involved the consideration and determination of the matter."

Justice Truax himself has told us that his judgment was rendered WITHOUT *considering or deciding* the *issue* as to the *validity*.

Thus it must appear that *the precise question* was raised AND DETERMINED in the former suit.

Well, it *does* so appear.

That this issue was *raised* there, all agree.

That it was DETERMINED, the only man in all the world who knows, now swears is NOT the fact.

By his evidence, all uncertainty upon this question has been forever removed.

The reason in Washington, &c., Packing Company *vs.* Sickles (*supra*), why the Court held that the former judgment was not conclusive was "because the verdict MIGHT have been rendered *without* reference to *that* count, and *only* upon the common counts".

It WAS so rendered—as Justice Truax has now sworn.

By Packet Company *vs.* Sickles it must appear that the judgment *necessarily* involved the consideration *and determination* of the matter.

Exactly *the opposite* appears at bar, namely, that it was NOT determined at all.

Instead of the issue of the decision of the validity of the releases being necessarily involved in the consideration and determination of the matter,

Justice Truax, by neither considering nor determining as to that validity, by avowedly resting his decision upon a legal ground that they never had anything to release;

And hence that he did not have to consider as to the releases; and so that he did *not* so consider,

Has now made it plain that, instead of that issue being necessarily, inevitably involved—IT NEVER WAS INVOLVED AT ALL.

In citing Russell against Place, in Steam Gauge and Lantern Company *vs.* Meyrose, 27 Fed., 213, BREWER, J., also quotes this passage from Hooker *vs.* Hubbard, 102 Mass., 245, FOSTER, J.:

> "The Court are of the opinion that upon the facts here presented, the learned Judge erred in extending the doctrine of estoppel by former judgment to the decree stated."
>
> "Estoppels of this description ARE ATTENDED WITH QUALIFICATIONS WHICH MUST BE STRICTLY OBSERVED. THEY ARE CONCLUSIVE ONLY AS TO FACTS WHICH WERE DIRECTLY PUT IN ISSUE AND DETERMINED in the former suit. If the pleadings present several distinct propositions of fact, THE JUDGMENT IS NOT CONCLUSIVE UPON ANY ONE OF THEM UNLESS IT APPEARS FROM THE RECORD or *aliunde* that the ISSUE upon which it was rendered was upon THAT proposition."

This cause was cited with approval in Russell *vs.*

Place (*supra*), in which latter decision Justice FIELD closes his opinion with the following remark:

> "According to Coke an estoppel must 'be certain to every intent'; and if upon the face of a record anything is left to conjecture as to what was *necessarily* involved AND DECIDED, THERE IS NO ESTOPPEL IN IT WHEN PLEADED, AND NOTHING CONCLUSIVE IN IT WHEN OFFERED AS EVIDENCE (SEE AIKEN *vs.* PECK, 22 Vt., 260, and Hooker *vs.* Hubbard, 102 Mass., 245)."

Fortunately it is no longer necessary to leave to *conjecture* whether Justice Truax did or did not decide the validity issue.

He has swept away all doubt by swearing that he did *not*.

FIFTH POINT.

As the State Court judgment was not responsive to the issues of the complaint, it is upon that ground also, no bar.

The complaint claims that the residuary estate was willed to Ritch, Bulkley and Vaughan for the twenty colleges.

And that it hence belongs to those colleges.

The theory of the complaint is thus stated by the Court of Appeals.

Trustees of Amherst College *et al. vs.* Ritch *et al.*, 151 N. Y., 301,

> "The theory of the complaint is that the apparently absolute gift" (of the residuary estate "in the fourth codicil, to Messrs. Ritch, Bulkley and Vaughan, individually, was really *upon a secret trust* for the benefit of the plaintiffs and their associates, in the *ninth* article of the will."

But the Court of Appeals decided that, *from the moment Mr. Fayerweather died, the residue belonged—not* to the twenty colleges at all—*but to his widow and next-of-kin.*

But that, as the latter, *by releasing* their claims, *abandoned it*;

A trust—which had been *dead for six months and twenty-seven days—arose from the dead.*

And that the residuary estate *then* became the property *of the twenty colleges.*

As no such resurrection theory is even *hinted at* in the *complaint*;

And as *the theory* of th ecomplaint, and *its allegations* were thus *disregarded* by the Court, it will be seen that *the relief* awarded WAS INCONSISTENT WITH the case made by the complaint, and was NOT embraced within its issues.

The law in such a case is thus laid down by the Court of Appeals in Arnold *et al. vs.* Angell, 62 N. Y., 511, by CHURCH, Ch. J.:

"The *relief must be consistent with the case made by the complaint, and embraced within the issue* (Code, Sec. 375)."

Romeyn *vs.* Sickles, 108 N. Y., 652, RUGER, Ch. J.:

"A direct conflict of evidence occurred on the trial between the plaintiff and the defendant as to the terms of the contract of employment, and the Referee has found in favor of the defendant's version of the transaction; but instead of giving him the benefit of such finding, HAS DECIDED THE LAW UPON A CAUSE OF ACTION NOT STATED IN THE PLEADINGS, or established, as we think, by the evidence.

It is a FUNDAMENTAL RULE that judgment shall be *secundum allegata et probata*, and, as was said in Day *vs.* Town of New Lots (107 N. Y., 148):

"ANY DEPARTURE FROM THAT RULE IS CERTAIN TO PRODUCE SURPRISE, CONFUSION AND INJUSTICE."

"It was said by Judge EARL, in Southwick *vs.* First National Bank of Memphis (61 Howard Prac., 170), that

"Pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. *If a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary.*"

Neudecker *vs.* Kohlberg, 81 N. Y., 301, DANFORTH, J.:

> "Notwithstanding the liberal rule of construction applied to pleadings under the Code, I am aware of no case or principle upon which a plaintiff may recover, not only upon facts not stated, but upon evidence which disproves those which are stated. THE PRINCIPLE STILL REMAINS that the judgment to be rendered by any Court MUST BE 'SECUNDUM ALLEGATA ET PROBATA" (Wright *vs.* Delafield, 25 N. Y., 226; Tooker *vs.* Arnoux, 76 *Id.*, 397)."

Stevens *vs.* Mayor, etc., City of New York, 84 N. Y., 305, DANFORTH, J.:

> "But notwithstanding the liberality of the law which permits this construction, the plaintiff can have no relief *that* '*is not consistent with the case made by his complaint*, and embraced within the issue' (Code, Section 275). * * *
>
> "*He must bring his case within the allegations as well as with the proof* (Bradley *vs.* Aldrich, 40 N. Y., 504)."

Graham *et al.*, *vs.* Read, Executor, etc., 57 N. Y. 683:

> "While the Prayer for a relief in a complaint did *not* control, and the Court could give any other relief *consistent with the complaint* made in the case; THE JUDGMENT MUST BE STILL SECUNDUM ALLEGATA ET PROBATA; THAT JUDGMENT COULD NOT BE GIVEN IN DIRECT HOSTILITY TO THE THEORY OF THE ACTION AND THE SUBSTANTIAL ALLEGATIONS OF THE COMPLAINT."

From the time of Chief Justice Marshall the Federal Courts have insisted upon the same rule of law.

The leading case which deals with the subject with great thoroughness is

Reynolds *vs.* Stockton, 140 U. S., 254.

BREWER, J.:

> "We are of opinion that the decision is correct and must be affirmed. The first and obvious reason is that the judgment of the Supreme Court of New York was not responsive to the issues presented. Under the Section of the Federal Constitution * * * which provides that 'full faith and credit

shall be given in each State to the public acts, records and judicial proceedings of Courts of other States,' the full faith and credit demanded is only that faith and credit which the judicial proceedings, had in the other State, in and of themselves required. It does not demand that a judgment rendered in a Court of one State, without jurisdiction of the person, shall be recognized by the Courts of another State as valid, or that a judgment rendered by a Court which has jurisdiction of the person, *but which is in no way responsive to the issues tendered by the pleadings*, and is rendered in the actual absence of the defendant, must be recognized as valid in the Courts of any other State. The requirements of that section are fulfilled when a judgment rendered in a Court of one State, which has jurisdiction of the subject matter and of the person, *and which is substantially responsive to the issues presented by the pleadings* or is rendered under such circumstances that it is apparent that the defeated party was in fact heard on the matter determined, is recognized and enforced in the Courts of another State." * * *

"If the fact of a judgment rendered in a Court of one State does not preclude inquiry in the Court of another as to the jurisdiction or the subject matter, *it certainly also does not preclude inquiry as to whether the judgment so rendered was so far responsive to the issues tendered by the pleadings as to be a proper exercise of jurisdiction on the part of the Court rendering it.*

"The invalidity of the judgment *depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation.* Its emphatic language is, that *a judgment to be conclusive* upon the parties to the litigation, *must be responsive to* the matters *controverted.*" * * *

THE RULE IS UNIVERSAL that, where he appears and responds only to the complaint as filed, and no amendment is made thereto, the judgment is conclusive ONLY SO FAR as it determines MATTERS WHICH, BY THE PLEADINGS, ARE PUT IN ISSUE.

The Court proceed to approve the statement in

Munday *vs.* Vail, 34 N. J. Law, 418, quoting:

"'A decree in equity, which is entirely aside of the issue raised in the record, is invalid, and will be treated as a nullity even in a collateral proceeding.

* * * 'Jurisdiction may be defined to be *the right to adjudge concerning the subject matter in the given case.* To constitute this, there are *three* essentials. * * * *Third.* the point decided must be, in substance and effect, WITHIN the issue.' * * * A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that *upon general principles, such a defect must avoid a judgment.*

'*A judgment upon matters outside of the issue must, of necessity, be altogether arbitrary and unjust*, as it concludes a point upon which the parties *have not been heard.* And it is upon this very ground, that the parties *have been heard*, or have had an opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated. *And this is the principal reason why judgments became estoppels.* But records or judgments are not estoppels with reference to *every* matter contained in them. They have such efficacy *only* with respect to the substance of the controversy and its essential concomitants. Thus Lord COKE, treating of this doctrine, says: 'A matter alleged that is neither traversable nor material shall not estop.'"

After this quotation the Supreme Court continues (p. 269):

> "This case is very much in point. We regard the views suggested in the quotation from the opinion *as correct*, and as *properly* indicating *the limits* in respect to which the conclusion of a judgment may be invoked in a subsequent suit *inter partes*." * * *
>
> "The proposition which we affirm is that in order to give a judgment, rendered by even a Court of general jurisdiction, the merit and finality of an adjudication between the parties, *it must, with the limitations heretofore stated, be responsive to the issues tendered by the pleadings.*"
>
> "The ground on which the judgment was rendered was so radical a departure from the case made and relief prayed by the original bill *as to be a new suit.*"
>
> Smith *vs.* Woolfolk, 115 U. S., p. 148.

Thus, in Crockett *vs.* Lee, 7 Wheat., pp. 525, 527, MARSHALL, C. J.:

> "If a *new* case might be made out in proof *differing from that stated in the pleadings, all will perceive* the confusion and uncertainty which would attend legal proceedings, and *the injustice which must frequently take place.*"

As for the reasons stated above at length the State Court decision is not *res adjudicata;* as its judgment was given *in direct hostility to the theory of the action, and the substantial allegations of the complaint;* as the Supreme Court of the United States says in Reynolds *v.* Stockton (*supra*), that "the judgment is conclusive ONLY SO FAR as it determines matters WHICH, BY THE PLEADINGS, ARE PUT IN ISSUE;"

As the State Court judgment *wholly omits to*

determine the matters which *were* put in issue by the pleadings, and decides the cause upon matters *outside of the issue*, which were *not* there put in issue;"

As the Supreme Court says (*supra*), that

"A judgment upon matters *outside of* the issue MUST OF NECESSITY BE ALTOGETHER ARBITRARY AND UNJUST, as it concludes a point upon which the parties have not been heard;" as that the parties have been HEARD "IS THE PRINCIPAL REASON WHY JUDGMENTS BECOME ESTOPPELS;"

And as it appears that neither upon the chief issue as to the title of the widow and next-of-kin, viz., the *validity* or invalidity of the releases; nor upon this issue upon which the State Court thus decided "*outside of the issue* in the complaint, *have the widow and next-of-kin to this day been* HEARD;

your Honors will be the better able to say if this State Court decision, thus coming squarely within the class characterized by this Court as "OF NECESSITY ALTOGETHER ARBITRARY AND UNJUST"

"is an estoppel; and shall interfere with your Honor's seeing to it *now* that justice *is at last* done.

A General Verdict. What is its Effect?

It has been claimed that, as the Court of Appeals thought that the short-form decision of Justice Truax had the same effect as a *general* verdict by a jury.

In Hooker *v.* Hubbard (*supra*), as there was *no certainty* that *the question of fraud* HAD BEEN *passed upon, the* Supreme Court of Massachusetts held that the former suit was *no* bar.

At bar, there is sworn, *uncontradicted* proof in this suit, from the lips of the Trial Justice himself in the former action, *that he did not consider or pass upon the question of fraud;* which ends all doubt upon *that* subject.

The Court of Appeals in its opinion in Trustees of Amherst College *et al. v.* Ritch *et al.*, 151 N. Y., 320, said:

> "We think that the *effect* of a decision by "the Trial Court without expressing the facts "found *is the same as* if there had been a "*general verdict* rendered by a jury, and that "the *same presumptions* arise in its support."

And to same effect in Bomeisler *vs.* Forster, 154 N. Y., 236.

And what *is* the *effect* of a *general verdict?*

Dickenson *vs.* Hayes, 31 Conn., 423.

> "Where two or more distinct causes of action are sued for in the same declaration, and there is a *general verdict* for the plaintiff; or a judgment for him on default; the record of such statement is NOT conclusive evidence that *both* or *all* of those causes of action *have been* PASSED UPON *or adjudicated.*"

Hungerford's Appeal from Probate, 41 Conn., 327. "In our modern practice it is usual to insert several GENERAL counts; and when the general issue is pleaded to these, many DIFFERENT claims may be tried; when upon pleadings thus formed, *a general judgment* is rendered, and is thereafter

pleaded in bar; it is *prima facie* evidence of a prior adjudication of every demand which might have been drawn into controversy under it; BUT LIKE OTHER *prima facie* EVIDENCE, IT MAY BE MET AND CONTROLLED BY OTHER COMPETENT EVIDENCE, TENDING TO SHOW THAT ANY PARTICULAR DEMAND OR CLAIM WAS NOT PRESENTED OR CONSIDERED."

Sawyer *vs.* Woodbury, 7th of Gray, 499.

Hooker *vs.* Hubbard, 102 Mass., 245, FOSTER, J.: * * * "The *grounds* of defense upon which the defendant now relies, have NEVER BEEN PASSED UPON by the Jury. The *verdict* in the former suit was *general;* but it was rendered in the defendant's favor *solely* BECAUSE IT WAS SHOWN that the note declared on had been paid or renewed by this present note. THIS FACT ALONE was *established;* AND IT WAS *all* THAT WAS NECESSARY to the defense in that case."

Foster & others v. *The Richard Busteed*, 100 Mass., 411. FOSTER, J.:

"And where in the *answer various matters of defence* are *set forth*, some of which relate only to the maintenance of the suit, and others to the merits, AND THERE IS A GENERAL DECREE OF BILL DISMISSED, FROM WHICH IT DOES NOT APPEAR WHAT WAS THE PREVAILING GROUND OF DEFENSE; IT IS IMPOSSIBLE TO HOLD THAT THE DECREE OPERATES TO PRECLUDE FUTURE PROCEEDINGS. THERE IS, IN OUR OPINION, NO TENABLE FOUNDATION FOR THE CLAIM THAT THIS PETITION HAS BEEN BARRED BY THE DISMISSAL OF THE FORMER ONES."

Young *vs.* Pritchard, 75 Me., 518, BARROWS, J.: "To raise an estoppel it is NOT SUFFICIENT to

show that the matter in controversy *may have been determined* in the former litigation * * * The party claiming an estoppel against his adversary must make it appear affirmatively by legal evidence that it *was* determined. As Lord Ellenborough said in Outran *vs.* Morewood (*supra*): "It is not the recovery, but the matter alleged by the party, AND *upon which* THE RECOVERY PROCEEDS, which creates the estoppel. * * *

It is just as essential that it should appear THAT IT *was found by* THE JURY (OR *other* TRIBUNAL TO which it was presented), and that it was "THE GROUND *upon which* THE RECOVERY PROCEEDED," as that it was matter alleged by the party, or particularly put in issue."

Ward *vs.* Boyce, 152 N. Y., 203, O'BRIEN, J.: "Did it prove that the disputed fact was in issue, litigated *and determined* in the former suit?

If it failed at *any* of THESE points IT *could not* CONCLUDE the plaintiff."

Hibshman *vs.* Dulleban, 4 Watts, 190.

The immediate object of the proceeding by an heir was for a legacy.

The Orphan's Court held a release given by the heir to the executors to be valid.

GIBSON, C. J.:

"The question raised by the demurrer is WHETHER THE *validity* OF THE *release* has passed *in rem judicatum.* * * *

"NEITHER THE JUDGMENT OF A *concurrent* or exclusive jurisdiction is evidence of any matter incidentally cognizable, *nor* OF ANY MATTER *to be* inferred by argument from the judgment, * * *

and as Starkie on Evidence, Part 2, Sec. 65, says 'IF IT DID NOT DECIDE THE POINT *there*, IT OUGHT NOT TO DECIDE IT *elsewhere*.' "

Affirmed in Forcey's Appeal, 106 Pa., 515.

At Bar the decision of the validity of the releases is not even as Chief Justice GIBSON said: "To be inferred by argument from the judgment," On the contrary (as has been seen, and as will be again seen presently), the inference by argument from the judgment *is just the other way*, namely, that that *validity* is NOT to be so inferred.

Woodgate *vs.* Fleet, 44 N. Y., 13, EARL, Com.:

"A judgment is conclusive upon the parties thereto only in respect to the *grounds* covered by it, and the law and facts necessary to uphold it; and although a decree, in express terms, purports to affirm a particular fact or rule of law; yet, if such fact or rule of law was *immaterial* to the issue; AND THE CONTROVERSY DID NOT TURN UPON IT; the decree will NOT conclude the parties in reference thereto."

People *vs.* Johnson, 38 N. Y., 63.

Justice Truax held the direct bequest of the residue to the colleges *legal*. Hence the "judgment is conclusive," "*only* in respect to" *that* ground, "and the law and facts necessary to uphold *it*."

To uphold *that*, was it necessary to hold that the bequest to the colleges was NOT legal? And so that the releases were *valid?*

The question answers itself.

"And the controversy did NOT turn upon it."

Where does Justice Truax even hint that the controversy as to the legality of the bequest of the residue to the colleges turns upon the fact that that bequest was *not* legal at all?

Our Courts Will Deal with Evasion of the Law.

These schemes to *evade* the law are understood by the Courts, and are dealt with by them. As was said by the Chancellor in Stockton *v.* C. R. R. Co., 50 N. J., 75:

"It must not be thought that Courts are powerless *to strip off disguises that are designed* to THWART the purposes of the law. The mere *suggestion of such* a condition *is an insult to the intelligence of the judiciary.*"

"Whenever such disguises are made apparent, *they can readily be disrobed.* The difficulty is in *showing* the disguises,—*not in penetrating* them when they appear."

In Tyler *vs.* Gardiner, 35 N. Y., 590, PARKER, J., in quoting the decision in the Parish will case, says:

> "The whole evidence of the case," says the learned Judge, "places him in a position where *an infeebled intellect*, though far from losing its intelligence and its capacity to do *ordinary* business, *may well be presumed unequal to* resisting reiterated importunities from one in her relative position. It would seem plain that she could have exercised an influence in regard to this codicil which would not

leave him to the exercise of his own free will. Are there any circumstances in this case to show that she *did* so? * * *

The whole burden of this codicil is for her benefit."

(at Bar the whole burden of this 5th codicil was *according to their own oaths*—for Ritch, Bulkley and Vaughan, only and *absolutely*, and particularly, *for Vaughan.*)

The influence was *easily* exercised when once its subject had been brought to submit to it, and in a way not at all suspicious, *a way not likely to be observed by one who had no idea of its existence*" (25 N. Y., 92).

Were the widow and her sister in that hour of great sadness, apt to be *mistrusting* the dying man's *friend?*

When he was all the time acting in "a way not likely to be observed by one who had no idea of its existence"?

Vaughan swears (fol. 1069, App. of Exhibits) that "I regarded him as my best friend, and I think he had the same opinion of me."

Mr. Fayerweather had to trust *somebody*,

(And he thought he *could* trust *Vaughan.*)

(P. 591.) "Thus SWINBURNE says, in commenting upon the effect of a testator's assent, under *similar* circumstances:

"It is to be presumed that the testator *did* answer. Yea, *rather to deliver himself from the importunity of the defendant*, than upon devotion or intent to make his will; *because it is for the most part painful and grievous to those that be in that extremity to speak or be demanded any question, and*

therefore are ready to answer any question almost that they may be quiet; which advantage *crafty and covetous persons* (of *New Jersey* experience), knowing very well, are then most busy, and *do labor with tooth and nail to procure* the sick person *to yield to their demands;* when they perceive *he cannot easily resist them;* (Albion M. Dyer, Grout's class-mate, testified thus,

[II, 1068.] Q. Did Mr. Grout, on that occasion,—say that Mr. Fayerweather, at that time, WAS IN NO CONDITION TO RESIST?

A. SUCH IS MY IMPRESSION"); neither hath *time to revoke* the same afterward, being then passing to another world;

and therefore *worthily and with great equity*, is that to be deemed for NO testament *when the sick person answereth yea*, the interrogation being made *by a suspected* person, *as well in respect of presumption of deceit in the one, as of defect of meaning of making a testament in the other;*

and this is true *especially when there is a former testament* (the 4th codicil); for that is *not* to be *revoked* by a second testament made at the interrogation of another, *in manner aforesaid;*

Swinb. Wills, Part 2, § 25.

"These are the *old* landmarks of the land, *and the Judges should be the last to remove them.* There is nothing in the present case to call for a departure from *well-established rules, founded in plain principles of justice*, and essential to the protection of rights and the prevention of fraud. They are tributary *alike to the security of the living, the repose of the dying, and the harmony of the family relation.*

"So far as the proof discloses, the first connec-

tion of the testatrix with this will was within eight hours of death."

(At Bar Vaughan had this codicil that he swears gave him and Ritch & Bulkley $1,200,000 *each absolutely, executed just about eight hours before the testator died.*)

"No essential provisions are directly traceable to the written instructions which were prepared three days before by the daughter, who thus secured to herself the bulk of the mother's estate.

(At Bar not only "the essential provisions", but *all* their provisions are not only NOT directly traceable to the written instructions "Oa"; and to the oral ones, which were prepared "NOT" three days before;

But NOT three HOURS before the execution at this death bed codicil, or as he says, I was largely the cause of the whole thing.

But *Vaughan swears* that he had them drawn in Ritch's office; and he and Ritch "thus secured to" themselves, they swear, about $3,600,000, "*absolutely*".)

"When *the principal beneficiary* under a will, prepared for execution by a party *worn down by disease and close upon the verge of death*, ASSUMES THE RESPONSIBILITY OF INITIATING IT; OF PREPARING FORMAL INSTRUCTIONS, OF EMPLOYING THE DRAUGHTSMAN, OF SELECTING THE WITNESSES (two young clerks *Vaughan* brought up from *Ritch's* office after *notifying* the family physician and the other doctors who had been asked to attend—NOT to come); OF BEING PRESENT AT EVERY STAGE OF THE PROCEEDINGS, AND OF EXCLUDING THOSE TO WHOSE INHERITANCE A NEW DIRECTION IS GIVEN; it behooves *such* beneficiary to be provided with evidence that this instrument expresses the *honest* and *spontaneous* purpose of the person who is called upon, at *such* a time, to *reverse* the provisions of a previous testamentary disposition, made in health and strength, in favor of those hav-

ing clear claims upon the justice and bounty of the testator."

The widow's sister, Mrs. A. A. Joyce Reynolds testified that the list drawn by Vaughan at the testator's dictation for this codicil of 4 days before—"*burned*" by Vaughan—had the names of the widow and next-of-kin, and amounts opposite to them, and that Mr. Fayerweather told her that that paper was "CORRECT".

(Cites many cases.)

"*The studied privacy* attending the *preparations* and *execution* of the will; the *constant presence* and *vigilance* of the *principal beneficiary;* and her *omission to advise* the son and grandson of her mother's approaching death; [Vaughan excluded the family from the room and did not let them know it was a codicil], *are familiar and marked indicia of the exercise of undue influence* under circumstances *like those developed by the evidence.*"

Crispell *v.* Du Bois, 4 Barb., 391.
Delafield *v.* Parish, 25 N. Y., 42.

"Swinburne, with his usual quaint and pithy directness, speaks thus of inferences deducible from this species of evidence; If the wife, being made executrix, *or any other person benefited by the testament* (Vaughan), understanding that the testator is about to *alter* his will, *will not suffer his friends to come unto him* (kept them all in the *sitting*-room), pretending peradventure that he is fast asleep or in a slumber; or the physician gave a charge that none should come to him, or

"pretending some *other* excuse; or else, *all excuses set apart do*, for charity sake, *shut them forth of the doors;*

Mr. Fayerweather's personal friend and pastor, Rev. Dr. William Lloyd,

I, 547. A. * * * For some four or five years before his death, *it was my custom to dine at his house* EVERY *Saturday.*

A. * * * And Mrs. Fayerweather was very much agitated,—very much; and began *to cry*; of course she thought he was dying.

33 Q. Did you meet Mr. Vaughan on that occasion?

A. I first asked, I think, for Morris Beardsley; because he used to be often there to dinner *on* Saturday (This was *Saturday*), also; and his wife; and they said Morris had gone out * * * and after a while Mr. Beardsley came in; and I am not sure whether Mr. Vaughan came in with him; or whether Mr. Vaughan came down stairs; That I cannot tell. But I know that Mr. Beardsley introduced me to Mr. Vaughan.

Q. You had never met him before?

A. Never had met him before.

Q. Did Mr. Vaughan know who you were?

A. Mr. Beardsley said, "This is Mr. Fayerweather's minister; Mr. Fayerweather's clergyman * * *

P. 551. I said at dinner that I would like to see him, if he was conscious.

42 Q. And what did Mr. Beardsley say to that,—if anything?

A. Well, after he left the table, I said again to him, after we had gone into the other room,

I said, "I would like to see Mr. Fayerweather if he is conscious, because I think he would like to have me with him when he dies," and if he was conscious, I would like to offer a prayer, and Mr. Beardsley said, "I will see," and went out and came back and said, Mr. Vaughan said that he did not think it was necessary, and I did not see Mr. Vaughan after this at all.

In these cases *the testament is void* in *detestation of such odious stripes and practices* (Swinburne on Wills, Part 7, § 18)".

These men prevented these ladies *from presenting* to the Surrogate the proof of their illegal and fraudulent practices *in obtaining* the 5th codicil;

And of the fact that it gave the property to them upon a *void* trust,

The trust upon which the deed of gift rested until years *after* getting the releases;

Upon the sworn *representations* also, that these three men *owned* the entire residue *absolutely*,

And *by shutting off* the contest by getting consents *to withdraw* the objections;

Which consents *were procured by said suppression, misrepresentation, menace and duress;*

And by giving these ladies about 10 cents on the dollar for releasing the other 90 per cent., when unknown to them, *but known to Parsons and to these three men*,—these ladies *owned the whole 100 per cent.* of that *residuary* estate,

These four men *thus* obtained the consent of the widow and next-of-kin *to withdraw* from the contest.

SIXTH POINT.

Executors in obtaining from heirs withdrawals of objections to probate, or in obtaining from them general releases, must disclose ALL that they know of that can in any way aid such heirs in protecting their rights and interests in the transactions.

The law upon this subject is firmly established by many decisions of the highest courts of this country and of England.

The position of persons obtaining such benefits is clearly defined.

Harriman on the Elements of the Law of Contracts :

248. "The existence of a FIDUCIARY relation between the parties to a contract IMPOSES ON THE FIDUCIARY THE DUTY OF ACTING WITH THE *utmost* FAIRNESS ; AND IF HE FAILS TO DISCLOSE *all* FACTS WITHIN HIS KNOWLEDGE AFFECTING THE TRANSACTION THE CONTRACT IS VOIDABLE."

Anson on Contracts * *137.*

" And again, in certain contracts said to be *uberrimæ fidei*, in which one of the two parties IS NECESSARILY AT A DISADVANTAGE AS TO KNOWLEDGE of the subject-matter of the contract, the law REQUIRES THE OTHER TO DISCLOSE *every* material fact, THAT IS, EVERY fact which MIGHT HAVE influenced the mind of a PRUDENT person." Walden *v.* La. Is. Ins. Co., 12 La., 134 ; Grisgby *v.* Stapleton, 94 Mo., 423.

1888 Edition, 2 Lewin's on Trust * *p. 926.* "The *cestui que trust must* BE FULLY cognizant of ALL the facts and circumstances of the case. Cites Lloyd *v.* Attwood, 3 Deg. & J. 615 and thirty other cases.

KERR ON FRAUD AND MISTAKE.

P. 300—"A MAN CAN NOT BE SAID TO ACQUIESCE IN WHAT HE DOES NOT *know*, NOR CAN HE BE BOUND BY ACQUIESCENCE UNLESS HE IS *fully apprised* AS TO HIS RIGHTS AND all THE MATERIAL FACTS AND CIRCUMSTANCES OF THE CASE. 10 Ves., 426, and other cases.

Harriman on Contracts, 248:

"There are certain contracts IN WHICH THE PROMISE OF ONE PARTY *is conditional upon the disclosure of all material facts* by the other party. Such contracts are termed *uberrmae fidei.*

251. If the party making the representation OF LAW occupies a FIDUCIARY position toward the other (Sims *v.* Ferrill, 45 Ga., 585), OR IF FROM HIS SUPERIOR MEANS OF INFORMATION THE OTHER PARTY IS REASONABLY ENTITLED TO ACCEPT HIS STATEMENT in regard to THE LAW (85 Ala., 434).

(1 Bigelow on Fraud, 489)—A STATEMENT OF LAW HAS THE SAME EFFECT AS A STATEMENT OF FACT. Note, see p. 253.

There is misrepresentation if a man represent *not the whole* of the fact, but *only a portion*, AND *omits what he ought to have known* WAS A *very material* FACT (Emma Silver Min. Co. *v.* Grant, 11 C. D., 935. 61 Fraud gives a cause of action if it leads to *any* sort of damage. Smith *v.* Kay, 7 H. L. C., 750, 755. But in order that a false representation

should give a cause of action, the damage must be the *immediate* and not the remote effect of the representation.

Misrepresentation may consist as well in the concealment of what is true as well *as in the assertion* of what is false. *If a man conceals a fact that is material* to the transaction, *knowing* that the other party *acts on* the presumption that no such fact exists, *it is as much a fraud as* it the existence of such a fact were *expressly* denied, or the reverse of it expressly stated. Peek *v.* Gurney, L. R., 6 H. L., 400, 62. A concealment to be material must be the concealment of something that the party concealing *was under some legal or equitable obligation to disclose;* and where there has been SUCH concealment, honesty of purpose WILL NOT AVAIL as a defense to an action from rescission.

Kerr, p. 95. To make a compromise of any value, THE PARTIES *must be at arm's* LENGTH, on *equal* terms, *with equal knowledge*, and with *sufficient advice and protection.*

Full and complete communication of *all* material circumstances is what the *Court must insist* on" Gordon *v.* Gordon, 3 Sw., 473, and *without full* disclosure honest intention *is not* sufficient. *Id.* 477.

96. The most comprehensive CLASS of cases in which EQUITABLE relief is sought, on the ground of *concealment*, is in the case of transactions between persons standing in a *fiduciary* relation to each other. In ALL SUCH cases the party who fills the position of active confidence *is* under an EQUITABLE obligation to DISCLOSE to the party towards whom he stands in such relation, every material fact which he himself KNOWS calculated to influence his conduct on entering into the transaction. THE

SUPPRESSION OF any MATERIAL FACT RENDERS THE TRANSACTION *impeachable in* EQUITY.

99. "Nothing is clearer in the Equity than the doctrine that a bargain FOUNDED UPON false representations made by the seller, ALTHO MADE BY INNOCENT *mistake*, WILL BE AVOIDED. Mistake as well as fraud in ANY representation of fact material to the contract IS A SUFFICIENT ground TO SET IT ASIDE." 1 Story, 172.

99-100. In Derry *v.* Peek, 14 App. Cas., 359, Lord HERSCHELL said: "Where RESCISSION is claimed, IT IS ONLY NECESSARY to prove THAT THERE WAS *misrepresentation;* THEN, however honestly it may have been made, however free from blame the person who made it, the contract HAVING BEEN OBTAINED BY misrepresentation, CANNOT stand.

125. The most comprehensive class of cases in which equitable relief is sought on the ground of CONCEALMENT, is in the case of transactions between persons standing in a FIDUCIARY relation to each other. In ALL SUCH cases the party WHO FILLS THE POSITION OF ACTIVE CONFIDENCE IS UNDER AN EQUITABLE OBLIGATION TO DISCLOSE to the party towards who he stands in such relation, *every* MATERIAL FACT WHICH HE HIMSELF KNOWS CALCULATED TO INFLUENCE HIS CONDUCT on entering into the transaction. THE SUPPRESSION OF ANY MATERIAL FACT RENDERS THE TRANSACTION IMPEACHABLE IN EQUITY. Walker *v.* Symonds, 3 Sw., 1; Wood *v.* Downes, 18 Ves., 120; Bulkley *v.* Wilford, 201 & Fin. 102, 177, 181; Maddeford *v.* Austick or Waddeford *v.* Bostwick, 1 Sim., 89; Lloyd *v.* Attwood, 3 D. & J. 614; Tomson *v.* Judge, 3 Drew. 306.

Kerr, 124.—In order that a COMPROMISE MAY BE SUPPORTED IN EQUITY IT IS ESSENTIAL THAT THE PARTIES SHOULD HAVE ACTED WITH *equal* KNOWLEDGE or at least equal means of knowledge in the matter IF ONE OF THE PARTIES HAS KNOWLEDGE OF A MATERIAL FACT WHILE HE *withholds* FROM THE OTHERS AND WHICH THEY *had not reasonable means of knowing*,—THE TRANSACTION *cannot stand.* A COMPROMISE CANNOT BE APPROVED OF WHERE ONE PARTY KNOWS ONLY SO MUCH OF HIS RIGHTS AS THE OPPOSITE PARTY *chooses to apprise him* OF.

TO CONSTITUTE A FAIR COMPROMISE OF A DOUBTFUL RIGHT THE FACTS CREATING THE DOUBT SHOULD BE EQUALLY KNOWN BY ALL THE PARTIES. THERE MUST BE A FULL AND FAIR COMMUNICATION OF ALL MATERIAL CIRCUMSTANCES AFFECTING THE QUESTION WHICH FORMS THE SUBJECT MATTER OF THE AGREEMENT AND WHICH ARE WITHIN THE KNOWLEDGE OF THE SEVERAL PARTIES AND WHICH THE OTHERS HAVE NOT REASONABLE MEANS OF KNOWING,—WHETHER SUCH INFORMATION *be asked for by* THEM OR NOT.

THERE MUST NOT ONLY BE GOOD FAITH AND HONEST INTENTION BUT FULL DISCLOSURE; AND *without full disclosure honest intention is not* SUFFICIENT.

A PARTY TO A COMPROMISE WHO HAS KNOWLEDGE OF A FACT MUST NOT TAKE UPON HIMSELF TO DECIDE THAT THE SUPPRESSED FACT IS IMMATERIAL IF IT COULD BY ANY POSSIBILITY HAVE HAD ANY INFLUENCE ON THE DECISION OF THE OTHER PARTY.

Kerr, 154.—IT IS THE DUTY of a trustee TO USE HIS *best* EXERTIONS for the advantage of THE CESTUI QUE TRUST.

HE MAY *not* PLACE HIMSELF *in a situation* IN

WHICH HIS INTERESTS WILL *come into conflict with* THAT WHICH HIS DUTY requires him to do.

ANY PERSONAL BENEFIT which he may gain by availing himself of his *fiduciary* character, must be acquired by a dereliction of duty, WHICH WILL ENURE FOR THE BENEFIT OF THE TRUST ESTATE.

Cites many Am. & Eng. cases, 9 Paige 237; 16 How., 535; 4 Johns. Ch., 693, 2 Edw. Ch., 478; 29 Me., 191.

THERE IS *no more sacred rule of equity* than that a trustee CANNOT SO EXECUTE A TRUST AS TO HAVE THE *least* BENEFIT FROM IT HIMSELF.

Forbes *v.* Ross, 2 Coxe, 116; Michoud *v.* Geroud, 4 How., 503; Bank of Orleans *v.* Torrey, 7 Hill, 260; Conyer *v.* Ring, 11 Barb., 36; Murray *v.* Vanderbilt, 39 Barb., 140; Slow *v.* Law, 3 Blatch., 459.

Farnam v. *Brooks*, *9 Pick. 220*, *Parker*, *C. J.*: "His AGE and BODILY INFIRMITY are not denied, but in relation to his capacity to transact business with intelligence, there is contrariety of evidence. We understand the law to be that no degree of physical or mental imbecility which leaves the party legal competency to act is of itself sufficient to avoid a contract OR SETTLEMENT with him. BUT IF ADVANTAGE IS TAKEN OF HIS WEAKNESS TO DRAW FROM HIM A CONTRACT OR SETTLEMENT, WHICH IS UNFAVORABLE BY MISREPRESENTATION, IMPOSITION, OR UNDUE INFLUENCE, SUCH CONTRACT OR SETTLEMENT CAN NOT BE UPHELD IN A COURT OF EQUITY.

224—The plaintiff would clothe the defendant with a character of a trustee over whose transactions in relation to the trust fund, COURTS OF EQUITY ARE PARTICULARLY WATCHFUL BECAUSE OF THE TEMPTATIONS trustees are under, and the opportunities they have TO SERVE THEIR OWN IN-

TEREST TO THE PREJUDICE OF THE *cestui que trust*. They cannot be themselves the purchasers of trust property, BUT UNDER SEVERE VIGILANCE OF THE LAW; AND THEY CAN NOT DEAL WITH THE *cestui que trust* WITHOUT THE UTMOST GOOD FAITH, AND THE MOST THOROUGH DISCLOSURE OF ALL THEY KNOW respecting the property. * * * IT MAY BE TAKEN AS THE RESULT OF ALL THE CASES THAT ANY MATERIAL MISREPRESENTATION OR ACTUAL CONCEALMENT OF FACTS WHICH ARE ESSENTIAL TO FAIR UNDERSTANDING OF THE SUBJECT OF THE CONTRACT, ITS VALUE, AND THE RELATIVE BEARING OF THE OFFERED CONSIDERATION MADE BY *a Trustee* to the *cestui que trust*, or by an agent to his principal *is afraid which will vitiate the bargain;* and that trustees, and those who are affected by that character in a Court of Equity, or who stand in a CONFIDENTIAL RELATION TOWARD THE PROPERTY AND THE OWNER, ARE STILL FURTHER OBLIGED in their bargains relating to the trust fund, NOT ONLY NOT TO MISREPRESENT, AND NOT TO CONCEAL, BUT ALSO *to disclose* EVERYTHING KNOWN TO THEM, WHICH IN THE MIND OF A PRUDENT MAN WOULD BE LIKELY TO AFFECT THE BARGAIN; and if this is NOT done, although there may be no design to cheat—IT IS CONSTRUCTIVE FRAUD.

GEYER v. SNYDER, *et al.*, 140 N. Y., 400:

"If the beneficiary is competent to contract, the trustee may deal with him without necessarily incurring the suspicion of bad faith, but if he buys an interest in the trust property, OR SECURES FROM THE BENEFICIARY A RELEASE TO HIMSELF, and it is shown that the price was INADEQUATE, or that he has made a PROFIT out of the transaction—THE

LAW PRESUMES FRAUD, or CONCEALMENT, or UNDUE INFLUENCE, OR SOME CONDUCT INCONSISTENT WITH LOYALTY TO HIS TRUST, and places upon him the burden of proving THAT HE *disclosed* TO THE BENEFICIARY *every* CIRCUMSTANCE relating to the CONDITION of the property, WHICH HE OUGHT TO KNOW, in order to FORM A CORRECT JUDGMENT of its value; AND THAT HE EXERTED NO UNDUE INFLUENCE TO OBTAIN THE ASSENT OF THE BENEFICIARY TO THE BARGAIN.

IT IS HERE THAT THE FATAL WEAKNESS OF PLAINTIFF'S CASE IS TO BE FOUND. She gave NO proof of INADEQUACY of price, OR TENDING TO SHOW that THE EXECUTORS HAD MADE A LARGE PROFIT out of the property purchased. HAD SHE SHOWN THAT—they obtained property of the estate worth $280,000 FOR $120,000, as she now alleges; or that, for $5,000, SHE RELEASED an interest in the estate WHICH WAS OF THE VALUE OF $10,000—THAT FACT ALONE would have given rise to A VERY VERY STRONG PRESUMPTION THAT SHE HAD BEEN DEFRAUDED BY THE EXECUTORS, from the consequences of which THEY COULD NOT ESCAPE, except by the MOST SATISFACTORY PROOF THAT NO MATERIAL INFORMATION HAD BEEN WITHHELD, and that the sale was her own FREE, INTELLIGENT AND DELIBERATE ACT."

Judgment Affirmed. ALL concur.

In Haviland *v.* Willets, 141 N. Y., 35, this Court, by Judge FINCH, in a carefully written opinion, say: "Assuming, as counsel for the appellants, "contends, that plaintiff's mistake was one of law, "and that the general rule excludes equitable re- "lief for such a mistake, when it is one of law, "pure and simple, and no other elements are pres-

"ent, it is still obvious that the doctrine does not "cover the *entire* array of facts here disclosed. It "is equally well settled that, when there is a mis- "take of law on one side, and either positive fraud "on the other, or inequitable, unfair and deceptive "conduct, which tends to confirm the mistake and "conceal the truth, it is the right and duty of "equity to reward relief. All the cases which "deny a remedy for mere mistake of law on one "side are careful to add the qualification that "*there must be no improper conduct on the other* "(*Silliman* vs. *Wing*, *7 Hill*, *159*; *Flynn* vs. *Hurd*, "*118 N. Y.*, *26*; *Vanderbeck* vs. *City of Rochester*, "*122 Id.*, *285*). THERE WAS IN THIS CASE EVI- "DENCE OF A STUDIOUS CONCEALMENT OF THE PRE- "CISE POINT ESSENTIAL TO THE FREE AND INTELLI- "GENT ACTION OF THE PLAINTIFF, BY THE EX- "ECUTOR, IN WHOSE POSITION AND ABILITY SOME "CONFIDENCE WAS REPOSED."

Fraud.

Hoyt v. *Latham*, *143 U. S.*, *566*, BROWN, J.:

"We have NO desire to weaken or qualify THE WHOLESOME DOCTRINE laid down by this Court in the case of MICHOUD *v.* GIROD, 4 How., 503, that a trustee CANNOT legally purchase, on his own account, that which his duty REQUIRES him to sell on account of ANOTHER; nor purchase on account of another that which he sells upon his own account—In other words, he can NOT UNITE the two OPPOSITE characters of buyer and seller. So JEALOUS IS THE LAW OF DEALINGS OF THIS CHARACTER BY PERSONS HOLDING CONFIDENTIAL RELATIONS TO EACH OTHER THAT THE CESTUI QUE TRUST *may* AVOID THE TRANSACTION *even though* THE SALE WAS WITHOUT

ACTUAL FRAUD, THE PROPERTY SOLD FOR ITS FULL VALUE, AND NO ACTUAL INJURY TO HIS INTEREST BE PROVEN."

Concealment.

Crosby v. *Buchanan*, *23 Wallace*, *454*, WAITE, C. J.:

"In a Court of *conscience* DELIBERATE CONCEALMENT IS EQUIVALENT TO DELIBERATE FALSEHOOD. When a living man speaks in such a Court to enforce a dead MAN'S CONTRACT WITH HIMSELF against parties who he knows *are ignorant of* THE FACTS, HE MUST BE *frank* IN HIS STATEMENTS unless he is willing to take the risk of presumption AGAINST HIM."

Judgments Got by Fraud.

1895.—*Dickson* v. *Patterson*, 160 U. S., 592—top.

HARLAN, J.: "If, as the evidence shows, the REAL FACTS WERE CONCEALED FROM HIM BY ONE FROM WHOM HE HAD REASON TO EXPECT A FRANK DISCLOSURE OF ALL THE MATERIAL CIRCUMSTANCES AS THEY OCCURRED; HE IS NOT FOR THAT REASON—no rights of innocent third parties having intervened—TO BE DENIED THE FULLEST RELIEF TO WHICH ACCORDING TO THE PRINCIPLES OF EQUITY HE IS ENTITLED."

SEVENTH POINT.

Omitting to RECITE, in a General Release—What is Released—is a Badge of Fraud.

Kerr on Fraud and Mistake:

171. "In dealing between parties, one of whom is subject to the influence of the other *there must be upon the face of the deed itself a fair and correct statement of the transaction.*"

In Gandy *vs.* Macauley, 31 L. R. Ch. Div., 16, FRY, L. J., says:

"No *prudent* SOLICITOR, NO *competent* solicitor, who was preparing a deed by which he knew that young ladies were giving up that large sum to an aunt with whom they were living *would have kept* THAT FACT *off* THE *face* OF THE DEED *unless* HE HAD BEEN MINDED THAT *a fraud* SHOULD BE COMMITTED; *and* THAT THEY SHOULD GRANT A *release in entire ignorance* OF THEIR *rights*. Therefore I think that THE *silence* OF THE DEED IS COGENT EVIDENCE OF ONE OR OTHER OF TWO THINGS: Either that he who prepared the deed *desired to conceal* SOMETHING FROM THE YOUNG LADIES, which I do not believe, OR THAT HE PROCEEDED IN ENTIRE *ignorance* OF THEIR *real* RIGHTS;

"And that is the conclusion at which I arrive from their evidence, *and from the deed itself.*"

FIFTH POINT.

In a purchase by a trustee from his cestui, gross inadequacy of consideration vitiates the contract.

BERNARD v. HUNTER, 2 Jur. N. S., 1213. *Crowe* v. *Ballard*, 1 Ves., Jr., 218. THURLOW, L. C. (Crowe, a youth under a tutor, fell into distress and applied to Ballard to raise money by selling a PROSPECTIVE legacy of a *thousand* pounds he owned. Ballard pretended that he took pains to sell it—THEN HE BOUGHT IT HIMSELF FOR 350 pounds.

"*Here he bought it at a price so outrageously low that it deserved no other name than that of a rank fraud.*

1810. *Darley* v. *Singleton*, *Wightwick*, *29*, *Graham Baron*,

"If the *inadequacy be very great, that alone* will induce the Court to PRESUME OPPRESSION.

Wood Baron—"I am of the same opinion. *The inadequacy* of price is *very great*. The plaintiff was clearly necessitous and the defendant the agent of the family. Injunction granted.

1866. *Tate* v. *Williamson*, 2 L. R. Ch. Ap., 59 Mid :

Atty. Genl.—for appellant, said : "The intestate was told to get independent advice. HE THEN EMPLOYED AN INDEPENDENT SOLICITOR, AND *if he was not properly advised*, THAT WAS NO FAULT *of* ROBERT WILLIAMSON.

60. LORD CHELMSFORD.

"In this case the Vice-Chancelor (Wood) has

made a decree that an agreement for sale by the intestate William Cloyes Tate to the defendant Robert Williamson, of the undivided moiety of an estate called the Whitfield Estate, in the County of Stafford, consisting of messuages, lands and coal mines, OUGHT TO BE SET ASIDE, upon THE *ground* of the defendant *not* HAVING COMMUNICATED to the intestate *all* the information which *he had acquired* with reference to the value if the property * * *.

64. Mr. Bristowe, for the defendant, said the instant the intestate refused to allow an attempt to compromise his debts, the defendant's *office of adviser came to an end.*

I CAN *not* accept *this* VIEW OF DEFENDANT'S position. * * *

65, mid. The refusal of the solicitors to proceed with the agreement, *unless* THE YOUNG MAN HAD *some legal* ASSISTANCE, the recommendation of the defendant THAT HE SHOULD APPLY TO *his father* FOR ADVICE, THE OPPORTUNITY AFFORDED HIM, pending the negotiation, OF CONSULTING ANY *friends* WHO WERE *capable of* ADVISING HIM; the reference to Mr. Payne, whether of completing the agreement or TO AFFORD THE INTESTATE AN *opportunity* of obtaining his *opinion* as to the value,

ALL THESE CONSIDERATIONS ARE OF *No* CONSEQUENCE WHEN ONCE IT IS *established* THAT *there was a concealment* OF A *material fact*, WHICH THE *defendant was bound to disclose.*

Nor after this is it of ANY importance to ascertain the real value of the property.

66, top. Even if the defendant could have shown that the price which he gave was a fair one, *that* WOULD *not* ALTER THE CASE AGAINST HIM. The

plaintiff, who seeks to set aside the sale, WOULD HAVE A RIGHT TO SAY, "*You had* THE MEANS OF FORMING A JUDGMENT of the value of the property IN YOUR POSSESSION. You were *bound*, by your duty to the person with whom you were dealing, to *afford him* THE *same* OPPORTUNITY WHICH *you had* OBTAINED OF DETERMINING THE SUFFICIENCY OF THE PRICE WHICH YOU OFFERED. YOU HAVE *failed* IN THAT DUTY AND THE SALE CANNOT STAND".

But, in truth, THERE ARE STRONG GROUNDS FOR THINKING THAT THE PRICE AGREED TO BE PAID BY THE DEFENDANT *is quite inadequate* TO THE VALUE OF THIS PROPERTY. * * *

(*7,000 pounds paid for property worth 14,000 pounds.*)

It appears to me, upon a careful review of the whole case, THAT IT WOULD BE CONTRARY TO THE PRINCIPLES UPON WHICH *equity* PROCEEDS, IN judging of the dealings of persons in a *fiduciary* relation, TO ALLOW THE PURCHASE by the defendant Robert Williamson TO STAND. * * *

67, top. The defendant, HAVING *by concealment* OF a valuation which he had privately obtained, *procured a considerable advantage* in the price which the seller was induced to take, and which even the defendant's witnesses PROVED TO BE *grossly inadequate, he can not be permitted to turn the confidence reposed in him to his own pocket, and the sale ought to be set aside.* Decree affirmed (1 Jac., 178; 1 Madd., 80; 18 Ves., 10).

But 30 Pa., 92, *the basis* upon which fraud IS *presumed*, is *gross* INEQUALITY IN THE CONTRACT, OR GROSS INADEQUACY OF consideration (1 Bro. Ch., 561; Gilmer, 230; 10 Harris, 251; 1 Mumf., 557; Wight, 25; 10 Ves., 209; 30 Pa., 93); 20 cases SURE

Unconscionable contracts will *Not* be enforced (Story's Eq., 751; 1 Adams Eq., 77, 84–5).

30 Pa., 94, top. *Great* inadequacy of price, viz., *from one-half to* TWO-THIRDS BELOW the market value, *is of itself sufficient* to prevent a Court of Equity from decreeing specific performance (6 cases); (Story's Eq., 245; 30 Pa., 95 foot); cases *shock conscience* (10 Harris, 251); (300, $6,000) (1 Story's Eq., 2512; 12 Harris, 259, 17 Vt.).

DURESS OF GOODS (6 cases).

If he speak at all, HE IS BOUND TO SPEAK *the truth* (57 Ind., 1; 39 N. Y., 655; 34 Miss., 423; 83 N. Y., 300).

In Geyer *v.* Snyder, 140 N. Y., 400, the Court says:

> "It is here that the fatal weakness of plaintiff's case is found. She gave no proof of inadequacy of price, or tending to show that the executors had made a large profit out of the property purchased. *Had she shown they obtained property of the estate worth $280,000 for $120,000, as she now alleges; or that for $5,000 she released an interest in the estate which was of the value of $10,000,* that fact alone would have given rise to a very strong presumption that she had been defrauded by the executors, from the consequence of which they could not escape, except by the most satisfactory proof that no material information was withheld, and that the sale was her own free, intelligent and deliberate act."

In Parmelee *v.* Cameron, 41 N. Y., 395, the Court, by JAMES, J., said:

"There are cases where there is no positive "evidence of fraud, and yet the inequality of "the bargain is so gross that the mind cannot "resist the inference that it was improperly "obtained. As in the case of Dunn *vs.* Cham- "bers (4 Barb., 376), where the property was "assigned for one-ninth of its value (at bar "less than one-tenth of the residue), only a "part of which was paid. In such cases a "Court of equity avoids the bargain, not "merely on account of its gross inequality, "*but because such inequality furnishes the* "*most vehement presumption of fraud.*"

In Wright *vs.* Wright (26 Atlantic Reporter, 166), decided in the Court of Chancery of New Jersey March 2d, 1893, Henry B. Vaughan, through a third party, William W. Gibbs of Philadelphia, procured from his wife's brother, William L. Wright, an assignment of all his interest in the estate of his father, George M. Wright, late of Bordentown, N. J., for the consideration of $350, by his agent falsely asserting that the estate was insolvent, when in fact it was solvent, and said interest was actually worth about $25,000. The Court held that Vaughan committed a fraud by taking undue advantage of his brother-in-law's necessities, and of his ignorance of the true condition of the estate, to purchase his interest for an inadequate consideration; and it decreed the transfers from the plaintiff to Gibbs and from Gibbs to Vaughan should be set aside, and that Vaughan should execute a re-conveyance to the plaintiff, and account to him for all that he had received under the assignment.

In Thomson *vs.* Eastwood
the House of Lords and Privy Council deal with conduct of this sort in precisely the same way. In 2 Law Rep. Appeal cases, page 233, foot, *Lord Chancellor Cairns* writing the opinion, says:

"Looking at the deed itself, what I find is that the parties to it on both sides, are placing the payment of this *300* pounds *in discharge* of the legacy of *3,000* pounds, upon a ground which, when it comes to be looked at judicially, shows that if there was no fraud intended and perpetrated by the one side upon the other; there was, at all events, *a state of mind*, upon the part of all the parties to this transaction, which showed that they were under an utter and entire *mistake* and delusion, as to what was and what was not material as to the title of the legatee.

Looked at in that way, and bearing in mind that it is a dealing between a trustee and his *cestuis que trustent;* although I have *no* evidence to fix any fraudulent motive or design upon it; I find it to be a dealing IN WHICH *the trustee*, WITHOUT ANY REASON OR GROUND WHICH CAN BEAR A MOMENT'S *examination* IS PUTTING ASIDE, AND *repudiating*, AND *denying the title* OF HIS *cestuis que trustent:*

And is UPON THE FOOTING OF THAT REPUDIATION, *making* TO HIM A PAYMENT OF *300* POUNDS *in discharge* OF THAT WHICH *ought* TO HAVE BEEN *a payment to him* OF *3,000* POUNDS.

My Lords, *that* of course is a transaction which, unaffected by any question of length of time, or acquiescence, or change of circumstances, COULD *not* BE ALLOWED IN A COURT OF EQUITY TO STAND FOR ONE MOMENT.

IT REQUIRES NO EVIDENCE OF FRAUD TO OVERTHROW IT;

IT IS A TRANSACTION WHICH *in itself* IS ABSOLUTELY NULL AND VOID.

It is, as I took occasion to say to the learned counsel in the course of the argument AS *invalid*, *as much a nudum pactum* as if a person, without any instrument to support it, chose to set up a payment of *300* pounds in discharge of a debt of *3,000* pounds.

THE INSTRUMENT, WITH ALL THAT IS RELATED IN IT, IS AN INSTRUMENT WHICH CAN*not for a moment* STAND IN *the way of a suit*, if brought in proper time, and brought under proper circumstances, *to recover* THE *legacy* IN RESPECT OF WHICH *this* PAYMENT HAS BEEN MADE."

Did the Ladies Know their Rights?

And as to whether the ladies themselves, at that time, *knew their rights*, the words of Judge CASSODAY in Leech, Executor, vs. Leech, 65 Wis., 285, are apt here:

"It is urged that there is no evidence to support the finding that she (the widow) was ignorant of the amount, extent and value of the estate, &c. * * *

"*The more serious question is* WHETHER THERE IS ANY EVIDENCE THAT THE WIDOW *did* HAVE ANY *knowledge* of the amount, extent and value of the real and personal estate; AND *her rights* AND *interests* IN THE SAME AT THE TIME SHE MADE THE DEED (OF *release*) and transfer."

After stating that, the Court proceed thus:

"In other words she (widow) proposed to *release* to the executors forever THE WHOLE *seven*-SEVENTHS OF WHAT SHE HAD IN THE ESTATE. *If they would allow her to receive* AND RETAIN *less* THAN *two*-SEVENTHS OF WHAT WAS THEN IN LAW HER OWN PROPERTY."

(At Bar scarcely ONE-TENTH.)

"The mere *statement* OF THE PROPOSITION *repels* ANY INFERENCE *of complete* KNOWLEDGE ON *her* PART AT THE TIME OF *the extent* AND *value* OF HER RIGHTS AND PROPERTY IN THE ESTATE."

Professional advice to release tends to sustain the transaction only where he has the fullest information as to the rights and interests of his client which the other side can disclose.

Reliance is placed by defendants upon the fact, if it *was* a fact, in *withdrawing* their obligations to probate of the codicils.

And in giving their *releases;* the widow *had the professional advice of Mr. Coudert;*

And the next-of-kin *of Ex-Judge Rollins.*

But, as already pointed out, it will be difficult to find proof in the record *that either of these lawyers had anything to do with advising these ladies as to said withdrawals and releases.* Fulsome Eulogy of their character and attainments is added, not only by counsel;

But by Judge Vann in the opinion of the N. Y. Court of Appeals.

But if they, or either of them, *did* advise such withdrawals and releases;

How does *that* fact *show that they had the requisite information to advisethem intelligently?*

Is further proof needed that both these gentlemen *knew nothing* of the *morning* instructions as to the disposition of the residuary estate, until disclosed by Vaughan *years afterwards* at the Truax trial?

And if as cannot be denied, they thus did NOT know the facts essential to a correct understanding of their clients rights, when those rights were thus being parted with.

Just what difference did it make that they had the counsel of these gentlemen, when, as one of them, in describing their situation, so well put it,

They were "GROPING IN THE DARK"!

Is *this* the situations, the law commands before the principal can be involved that having a professional adviser—when a client is releasing—implies that all was done that should have been done.

Hence that such release should stand?

The Courts point out what must be shown before professional advice in such a transaction can avail those who sue to retain the fruits of their bargain.

Kerr on Fraud and Mistake, 423.

In all cases indeed where an *independent legal adviser* or solicitor is employed, the evidence that *everything* which was necessary to be KNOWN *had*

been brought to the knowledge of his employer would be conclusive. DeMontmorency *v.* Devereux. See Cla-, Fin-, 188. *The intervention, however, of another solicitor goes for nothing, unless it be shown that he had sufficient information,* and took sufficient pains TO MAKE HIS INTERVENTION OF VALUE. Luddy's Trustee *v.* Peard, 33 C. D., 500 ; Howell *v.* Powell, 1900, 1 Ch. 243 ; Cordery, 187, Godefroi on Trust, 347.

> " But the fact that another solicitor has been called in to protect the client, IS OF NO AVAIL, UNLESS such solicitor not only *knows* ALL the circumstances, BUT ALSO DOES ALL THAT IS NECESSARY TO GUARD HIS CLIENT'S INTEREST. Barnard *v.* Hunter, 2 Jur., N. J., 143 ; Gibbs *v.* Daniel, 4 Giff, 1 ; King *v.* Savery, 1 Sur. & G., 271 ; 5 H. L. C., 627.
>
> If, nothwithstanding the assistance of the other solicitor, THE CLIENT HAS IN FACT REMAINED UNDER THE UNDUE INFLUENCE of his FORMER adviser, THE PRECAUTION FAILS TO PROTECT THE LATTER (Moxon *v.* Payne, 8 Ch. App., 881). And if another solicitor is MERELY summoned TO COMPLETE THE FORMALITIES OF THE PURCHASE, THE RESULT IS THE SAME (Slater *v.* Nolan, I. R., 11 Eq., 367)."

Perry on Trusts, 149.

But such employment goes for nothing unless it be shown that the new SOLICITOR HAD *sufficient* INFORMATION ; AND TOOK *sufficient* STEPS TO MAKE HIS INTERVENTION OF VALUE. Slater *v.* Nolan, Rep., 11 Eq., 367, 407.

HOGHTON *v.* HOGHTON, 15 Beav., 279, ROMILLY, M. R.

In Tate *v.* Williamson, CHELMSFORD, L. C., did

not stop, when he found the releasor had PAYNE, an INDEPENDENT ADVISER. He said *all that was of no consequence where* there *was concealment* of a material fact which they were *bound to there disclose.*

The Doctrine of "At Arm's Length."

Defendants are sure that these ladies were "at arm's length", when they sold their heritage for NOTHING.

They point with satisfaction to the words of Judge Vann in the opinion of the Amherst v. Ritch (151 N. Y., 322, IV, 74).

"The controversy as to whether there was a secret trust or not, as well as the contest over the probate of the will, was fairly covered by the terms of the releases so far as the parties to those instruments were concerned.

They dealt with each other at arm's length, as adversary parties, *knowing the substantial facts*, and they are presumed to have had them in mind when the releases were executed."

But is not this a *new* view of the doctrine of "Arm's length"?

Have your Honors ever heard of it before?

Where is *it laid* down?

Is *all* a trustee has to do, to *refuse* to divulge the trust to the cestui?

Then say—*now* we are "*at arm's length*".

Now I can buy from you—freed from having to disclose to you the facts which *show* the trust. Which facts *I know;*

But which *I know that you do not know.*

Unfortunately every now and then we hear of trustees, who would *welcome* such law as *that*. Hold *that* to be the law, and what more inviting field of operations would there be for the unscrupulous, than to prevail upon others to make them their executors.

Then after the death to turn to the heirs and say:

"Why, we are 'at arm's length!'" I do not *have to tell you* what the testator *meant* to do with his money.

The face of the will is silent. But I know, to be sure, *for he told me.*

Or he *wrote* the memorandum No. 1 to accompany his will.

Or No. 2 to go with his first codicil.

Or No. 3 with his third codicil.

I wrote "O_3" at his dictation.

But the law says that you and I *are* "*at arm's length.*" So, although *no one else* knows that such memorandum *exists* even;

Yet, as you see, I do not have to enlighten you.

I have no duty to you now. The law says that we are *strangers.*

Get-rich-quick schemes crop up quite often enough already. But what would be the effect upon them of such law as *that?* Executors would be working *overtime.*

There would be danger of the estate coming out like that of Nicholson, reported in 1st Nevada, where the administrator—eager as he was to get the appointment, so managed the estate of $4,000, that there was not enough of it left to *bury* the deceased.

Has the law of "Arm's length" so changed?

Or is it just as it has been for more than a century?

1804, *Hatch* v. *Hatch*, 9 Ves., Jr., 297, ELDON, L. CH.:

"If the Court does not watch these transactions *with a jealousy almost invincible* IN a great majority of cases IT WILL LEND ITS ASSISTANCE TO FRAUD. Where the connection IS not DISSOLVED, the account not settled, EVERYTHING REMAINING PRESSING UPON THE MIND OF THE PARTY UNDER THE CARE OF guardian for TRUSTEE."

The accounts at bar had not only not been settled, but they have not been settled even to *this* day.

Luddy's Trustee *v.* Peard, L. R., 38 Ch. Div., 500, KAY, J.:

"In *ex-parte James*, 8 Ves., 352, Lord Eldon REFUSED TO PERMIT A SOLICITOR TO BECOME A PURCHASER, who had CEASED to act as such UPON THE GROUND that whilst acting as solicitor he had procured ALL the information that might be useful to him. And he again repeats THE RULE that, to enable a person who *had* held a confidential situation PREVIOUSLY to the purchase, to become a purchaser HE MUST SHOW THAT he had at the time of the purchase *shaken off* THAT CHARACTER by the *consent* of the *cestui que trust*, FREELY given after *full* INFORMATION, and bargained for the rights of purchase."

You have had a chance to see the "FULL information" as to their rights given to these ladies.

It is an INFLEXIBLE rule of a Court of Equity that a person in a FIDUCIARY position is not entitled to make a profit; *he is not allowed* to put

himself in a position *where his interest and duty conflict.*

"*After the termination* OF the fiduciary relation, it is open to the parties to deal on the same terms as strangers, but if a relation of confidence *be once established*, either some POSITIVE ACT, or some *complete* case of *abandonment must be shown, in order to determine it* (Rhodes *v.* Bate, 1 Ch., 260). If the confidential relations between the parties has NOT terminated *at the commencement of the negotiation*, the principles which govern the case of dealings between parties standing in a fiduciary relation *continue* TO OPERATE (CARTER *v.* PALMER, 861 & Fin., 657). A man, for instance, who has, in the course of a fiduciary employment, *acquired some peculiar knowledge* as to the property of his employer, *cannot, after the cessation of the relation, use* the knowledge so acquired, *for his own benefit*, and to the *prejudice* of the other (Carte *v.* P., *supra*; HOLMAN *v.* LOYNES, 4 D. M. & C., 270.

(2 Ma-c & G. 10.) Kerr on Fraud and Mistake.

P. 138.—The ONUS however rests upon the trustee AND HE IS BOUND TO PRODUCE CLEAR affirmative proof THAT THE PARTIES WERE *at arm's length*; that the *cestui que* trust HAD THE FULLEST INFORMATION upon ALL material facts; and that, having THIS information, they agreed to and adopted what was done. Williams *v.* Scott, 1900, A. C., 499.

139. "But the transaction BECOMES IMPEACHABLE, IF THERE IS *any secret or underhand* DEALING ON THE PART OF THE TRUSTEE."

At Bar "the FULLEST information" came not in

1891, when getting our releases; but 6 years later when we learned part of the contents of Parsons' pocket.

P. 140.—Nor will the principle operate AFTER the relation of trustee and *cestui que* trust is clearly dissolved. (But a man who has been a trustee CANNOT, AFTER THE TERMINATION BE ALLOWED TO AVAIL HIMSELF FOR HIS OWN BENEFIT, and to the prejudice of the party for whom he has been trustee, OF ANY INFORMATION WHICH HE MAY HAVE ACQUIRED DURING THE EXISTENCE OF THE RELATION. Lacey, Trecothick, Bennet, Morsev. Royal, 12 Ves. 373; *Ex.* p. Larkin- 4-C. B. Tyv; Luddy's Trustee *v.* Peard- 33 C. D. 500; * * * P.)

KERR ON FRAUD AND MISTAKE.

P. 152.—THE AGE OR CAPACITY of the person conferring the benefit, and the nature of the benefit are of litle importance in such cases. Rhodes *v.* Bates, L. R. 1-Ch. App. 252.

153.—IF A RELATION OF CONFIDENCE *be once established*, EITHER SOME POSITIVE ACT, OR SOME COMPLETE ACT *of abandonment* MUST BE SHOWN IN ORDER TO DETERMINE IT.

The mere fact that the relation *is not called into existence* IS NOT SUFFICIENT OF ITSELF TO DETERMINE IT. See Rhodes *v.* Bates, *supra.*

If the confidential relation between the parties has not terminated at the commencement of the negotiation, the principles which govern the case of dealings between parties standing in a fiduciary relation *continue* TO OPERATE. 5.

A man, for instance, in the course of a *fiduciary* employment, ACQUIRED SOME PECULIAR KNOWLEDGE as to the property of his employer *cannot*

after the cessation OF THE RELATION, USE THE KNOWLEDGE SO ACQUIRED *for his own benefit*, AND TO THE PREJUDICE OF THE OTHER.

IT DOES NOT SEEM TO ALTER THE RULE THEN, BECAUSE THERE HAS BEEN A CESSATION OF THE RELATION. IF IT DID, ALL THE TRUSTEE NEED DO WOULD BE TO REFUSE TO DEAL WITH THE CESTUI, AND SO BRING A CESSATION.

Smith v. *Townsend*, 27 Me., 368. "In order to support a purchase of a trustee from a *cestui que trust*, IT MUST appear that the trustee *has thoroughly divested himself of that character* IN THE TRANSACTION, and entered into a NEW and DISTINCT contract with the *cestui que trust*, THAT person having the FULLEST information on EVERY subject." Lewin on Trusts, 463.

At Arm's Length. COLTON v. STANFORD, 82 Cal., 380.

"It must clearly appear that the purchaser AT THE TIME OF THE PURCHASE *had shaken off* HIS CONFIDENTIAL CHARACTER BY THE CONSENT OF THE CESTUI QUE TRUST. FREELY GIVEN AFTER FULL INFORMATION AND BARGAINING FOR THE RIGHT TO PURCHASE." 2 Sugden on Vendors, 417, bottom Paging, 693.

Your Honors have had a glimpse at how FULL our information was—at how far Judge Vann was correct in saying of these ladies—"*knowing* the *substantial* facts," when the best our then Counsel could say, was, "WE ARE GROPING IN THE DARK."

When one look into Parsons' pocket would have changed that darkness into noonday sun.

Parsons himself, with his marvellous view of the law of disclosure—when cestuis are parting with

their rights—must have at some time run against a hint that it might not be just as he stated it.

It has been familiar to the profession for many a score of years.

The Duty of Full Disclosure.

Harris v. *Tremenheeres*, 15 Ves. Jr., 30, ELDON, L. C.:

"If I could find in the answer or the evidence THE SLIGHTEST HINT THAT THE DEFENDANT *laid before* THE TESTATOR ANY ACCOUNT OF THE VALUE OF THE PREMISES THAT *was not perfectly accurate*, THAT would induce me TO SET THEM ASIDE WHATEVER THE PARTIES INTEND, UPON THE GENERAL GROUND that the principle NEVER would be safe if the agent could take a gift from him upon a representation THAT WAS NOT MOST ACCURATE AND PRECISE."

Wharton on Contracts, Sec. 256 A:

"If one (member of a family) PERCEIVES ANOTHER TO BE LABORING UNDER AN ESSENTIAL MISAPPREHENSION (in respect to a family settlement), *the party knowing the truth is bound to* CORRECT SUCH MISAPPREHENSION. UNDER SUCH CIRCUMSTANCES THE *non*-CORRECTION OF SUCH MISAPPREHENSION *is equivalent to its indorsement*, '*Full* AND *complete* COMMUNICATION OF *all* MATERIAL CIRCUMSTANCES IS *what the Court must insist on without full disclosure.* HONEST INTENTION IS *not* SUFFICIENT' (Gordon *v.* Gordon, 3 Swans., 400; Fane v. Fane, L. R., 20 Eq., 698)."

Pollock on Principles of Contract, 4th Ed., p. 512:

"Active concealment seems to be the appropriate description for the following sorts of conduct: TAKING MEANS appropriate to the nature of the case TO PREVENT THE OTHER PARTY FROM LEARNING A MATERIAL FACT, such as using contrivances to hide the defects of goods sold; or making a statement TRUE IN TERMS AS FAR AS IT GOES, BUT KEEPING SILENCE AS TO OTHER THINGS WHICH, IF *disclosed*, WOULD ALTER THE WHOLE EFFECT OF THE STATEMENT, so that what is in fact told IS A HALF TRUTH, EQUIVALENT TO A FALSEHOOD (Peck *v.* Gurney, L. R., 6 H. of L., 403), OR ALLOWING THE OTHER PARTY TO PROCEED ON AN ERRONEOUS BELIEF TO WHICH ONE'S OWN ACTS HAVE CONTRIBUTED." (Cites cases.)

P. 140. If the trust property is taken entirely out of a man's hands and all of his authority over it put to an end by the interposition and act of law, as in the case of a sale by execution, there is no reason why he should not be able to purchase.

A trustee CANNOT BE ALLOWED TO PURCHASE THE TRUST ESTATE *by his retirement from the trust with that object in view* (Spring v. Pride, 4 D. J. & S., 395.

Perry on Trusts, 4th ed., Sec. 851. "But all agreements or contracts between trustees and *cestui que trusts* are LOOKED UPON WITH SUSPICION by the Court, *and are closely scrutinized*; therefore, *in order that the release*, confirmation, waiver, or acquiescence, *may have any effect*, the *cestui que trust must have* FULL knowledge of *all* the facts and circumstances in the case. (Cites 30 cases.)

All the surrounding circumstances. GORDON v. GORDON, 3, Swanst., 467, ELDON, L. C.:

"Holding this to be a family agreement the Court would not disturb it PROVIDED THAT THERE

WAS HONEST DEALING ON BOTH SIDES AND EACH WITHHELD THE COMMUNICATION OF NO CIRCUMSTANCE PROPER FOR THE CONSIDERATION OF THE OTHER. * * *

But in every case it has been said, and it would be monstrous to hold otherwise, THAT IF WHAT ONE KNOWS HAS BEEN CONCEALED FROM THE OTHER WHO HAS BEEN MISLED BY THAT CONCEALMENT the Court would NOT sanction the agreement. * * * 473. In contracts of this sort *full* AND COMPLETE COMMUNICATION OF MATERIAL CIRCUMSTANCES IS WHAT THE COURT MUST INSIST."

Anson on Contracts.

*157. NON DISCLOSURE OF MATERIAL FACT. CONTRACTS UBERRIMAE FIDEI.

"There are some contracts in which more is required than the absence of misrepresentation or fraud. There are contracts in which one of the parties IS PRESUMED TO HAVE means of knowledge which are NOT ACCESSIBLE TO the other, AND IS THEN BOUND TO TELL HIM EVERYTHING WHICH MAY BE SUPPOSED LIKELY TO AFFECT HIS JUDGMENT. In other words, EVERY contract may be invalidated *by material misrepresentation*, and SOME contracts EVEN BY NON-disclosure of a material fact.

Note.—EVERY fact and circumstance which CAN POSSIBLY INFLUENCE THE MIND OF the insurer, in determining whether he will underwrite the policy, or at what premium, is MATERIAL to be disclosed, AND A CONCEALMENT THEREOF WILL VITIATE THE POLICY." Ely v. Hallett, 2 Raines Rep., N. Y., 57; 10 Gray, 508; 80 Gal., 440; 17 Wend., 359; Phenix L. I. Co. v. Raddin, 120 U. S., 183, 131 N. Y., 485; 133 Mass., 882; 117 U. S., 519; 111 Ind., 31.

N. B. & Canada R. R. v. Muggeridge Dr. & Su., 381 KINDERSLEY, V. C.:

"Those who issue a PROSPECTUS, holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state EVERYTHING with STRICT and SCRUPULOUS ACCURACY, and not only to ABSTAIN FROM stating ANY fact which is NOT SO, BUT TO OMIT NO ONE FACT WITHIN THEIR KNOWLEDGE, the existence of which MIGHT IN ANY DEGREE affect the nature, or extent, or quality or the privileges and advantages which the prospectus holds out as inducements to take shares."

Godefroi on Trusts *on* "Persons who give a release WITHOUT *full* KNOWLEDGE OF THEIR RIGHTS, or without the means of obtaining *Independent advice*, and especially when they are in humble circumstances or illiterate ARE NOT BOUND BY THEIR ACTION (Cites cases).

AND ON EQUITABLE GROUNDS SUCH AS THESE THE RELEASE WILL BE SET ASIDE in an action.

SO ALSO WHERE A TRUSTEE HAS OBTAINED A RELEASE ON A *misrepresentation* of the RIGHTS of the *cestui que trust*, IT WILL NOT BE ALLOWED TO STAND. Thompson *v.* Eastwood, 2 Ch. Cas., 25. "And it has been held that a trustee can not plead a release without setting out the accounts upon which it is based. 5 Eq., 361.

A RELEASE CAN OF COURSE *never* STAND IF OBTAINED BY PRESSURE, OR UNDUE INFLUENCE, OR IGNORANCE OF RIGHTS.

P. 407. Where a release was given by a lady before marriage, UNDER AN ERRONEOUS VIEW OF

HER RIGHTS, it was held that it was unnecessary to allege that the TRUSTEES WHO TOOK IT WERE GUILTY OF FRAUD, THOUGH the claim to set it aside was not made UNTIL TWENTY YEARS AFTERWARDS. *Re* Garnet and Gandy *v.* Macauley, 31 C. D. 1; see *Re* G. Robinson v. Gandy, 33 C. D., 390.

The pretended "*Gifts*" of $310,000 were shockingly inadequate as a price for the sale and conveyance of the interests of the widow and nieces in the residuary estate, which were worth at least $2,200,000.

Upon the point of *inadequate consideration*, treat these "gifts" for a moment as the purchase price of these distributive shares.

In *Parmelee* v. *Cameron* (41 New York, 392, 395), the Court said :

" There are cases where there is no positive evi-
" dence of fraud, and yet the inequality of the
" bargain is so gross that the mind cannot resist
" the inference that it was improperly obtained.
" As in the case of *Dunn* v. *Chambers* (4 Barb.,
" 376), where the property was assigned for one-
" ninth of its value, only a part of which was paid.
" In such cases a court of equity avoids the bargain,
" not merely on account of its gross inequality, but
" because such inequality furnishes the most vehe-
" ment presumption of fraud."

Parmelee v. *Cameron*, *41 New York, 392, 395.*
Kerr on Fraud and Mistake, *pp. 186-7.*

Equity will relieve from harsh bargains, although no fiduciary relation existed between the parties,

if the price was grossly inadequate, and any false representation was made, or material fact suppressed, or unfair advantage taken.

Wright v. *Wright*, *26 Atlantic Rep.*, *166.*
Dunn v. *Chambers*, *4 Barb.*, *876.*
Jones v. *Jones*, *120 New York*, *588*, *599.*
Barnard v. *Gantz*, *140 New York*, *249*, *255–8.*

Tait v. *Williamson*, *L. R. 2 Ch. App.*, *55.*
Morse v. *Royal*, *12 Vesey Jr.*, *355*, *371.*
Gandy v. *Macaulay*, *L. R. 31 Ch. Div.*, *16.*
Crowe v. *Ballard*, *1 Vesey Jr.*, *218.*
Thompson v. *Eastwood*, *L. R. 2 App. Cases*, *215*, *232.*

In *Jones* v. *Jones* (120 *New York*, 588, 599), a brother induced his sisters to sell their interests in their father's land, of whose will he was executor, to his wife's father, for $2,000, when they were in fact worth $12,000, representing that their shares were only worth $1,000 each, and were subject to assessments which had to be paid at once, and that a considerable part of the property would have to be sold to pay the taxes and assessments, and concealing the fact that the assessments could be settled at a discount, or that the payment was not required for a term of years from the levy, and, also in regard to the terms of a lease which had been made of the lands. The deeds were set aside, the Court, BRADLEY, J., saying: "In view of the fact "that the sale was for a grossly inadequate price, "those representations and concealments were such "as a court of equity may properly characterize as "fraudulent for the purposes of the rescision of a

"sale, cancellation of a conveyance, and the res-
"toration of property transferred by it."

In *Tait* v. *Williamson* (*L. R. 2 Ch.*, *App.. 55*) a young man of twenty-three, deeply in debt, applied to his great uncle for relief, and the uncle sent a nephew, authorized to advance £500, or more, if required. The young man refused to compromise his debts, but offered to sell his estate, and the nephew offered him £7,000 for it. Before the sale was consummated, the nephew ascertained that the property was worth £20,000 by reason of mines under it. He did not disclose this information to the young man, but completed the purchase for £7,000. The transaction was set aside as unfair and inequitable.

In *Gandy* v. *Macaulay* (*L. R., 31 Ch. Div., 16*), an aunt who was a co-residuary legatee with her two nieces, bought their shares of the residuary estate at their full appraised values, but that was only about two-thirds of what they were actually worth. The releases were set aside because the consideration was inadequate and the nieces had not been fully informed of their rights, or of the true value of their interests.

In *Morse* v. *Royal* (*12 Vesey Jr., 355, 371*), Lord ERSKINE says: "If the Court can discover that "some advantage had been taken, some informa-
"tion acquired which the other did not possess,

"though it is not to be precisely discovered, inad-
"equacy, without going to the length of requiring
"it to be such as shocks the conscience, will go a
"vast way to constitute a fraud."

Gross Inadequacy.

1790. *Crowe* v. *Ballard*, 1 Ves. Jr., 218. Crowe sold his expectancy of a legacy of £1,000 to Ballard for £350. Crowe being IN GREAT DISTRESS FOR MONEY.

Lord Chancellor *Thurlow*: "He bought it at a price SO OUTRAGEOUSLY LOW THAT IT DESERVES NO OTHER NAME THAN *rank fraud*.

See 8 Ves. Jr., 137, Note: "10 do., 202, 292; 6—H. & L.; 526;

Havilamd v. *Willets*, *141 New York*, *35*.

Geyer v. *Snyder*, *140 New York*, *394*, *400*.

Graves v. *Waterman*, *63 New York*, *657*; *rev'g 4 Hun*, *687*.

Sears v. *Shafer*, *6 New York*; *268*, *272*.

Bolton v. *Gardiner*, *3 Paige Ch.*, *273*, *279*.

Thomson v. *Eastwood*, L. R., *2 App. Cas.*, *215*.

Boson v. *Statham*, *1 Cox Eq. Cases*, *16*.

Playright v. *Lambert*, *52 Law Times N. S.*, *646*, *654*.

Mockerjee v. *Mockerjee*, *9 L. R., Indian Appeals*, *18*.

In *Geyer* v. *Snyder* (*140 New York*, 894, 400), a residuary legatee, entitled to one twenty-eighth part of the estate, had executed a release to the executors for $5,352, which she alleged to be inadequate. But she failed to offer any evidence of such inadequacy, and neglected from 1879 to 1890 to take any action to set it aside. The case was decided against

her for failure of proof and prolonged acquiescence, but the rule for which we contend was affirmed by the court as follows: "If the beneficiary is competent to contract, the trustee may deal with "him, without necessarily incurring the suspicion "of bad faith. But, if he buys an interest in the "trust property, or secures from the beneficiary a "release to himself, and it is shown that the price "was inadequate, or that he has made a profit out "of the transaction, the law presumes fraud, or "concealment, or undue influence, or some conduct "inconsistent with loyalty to his trust, and places "upon him the burden of proving that he disclosed "to the beneficiary every circumstance relating to "the condition of the property, which he ought to "know in order to form a correct judgment of its "value, and that he exerted no undue influence to "obtain the assent of the beneficiary to the bargain. It is here that the fatal weakness of plaintiff's case is found. She gave no proof of inadequacy of price, or tending to show that the executors had made a large profit out of the property "purchased. Had she shown that they obtained "property of the estate worth $280,000 for $120,000, "as she now alleges; or that for $5,000 she released an interest in the estate which was of the "value of $10,000, *that fact alone would have given "rise to a very strong presumption that she had "been defrauded by the executors*, from the consequence of which they could not escape, except "by the most satisfactory proof *that no material "information was withheld*, and that the sale was "her own, free, intelligent and deliberate act."

In *Haviland* v. *Willets* (141 New York, 35), the plaintiff, being next-of-kin of the testator, released to the executor an interest worth about $80-

000 coming to him from a lapsed legacy under an arrangement by which he received about $19,000 of which $4,000 was made up of two legacies to his father and himself. He did this knowing the facts upon which his right to the lapsed legacy depended, but in ignorance of his legal rights upon such facts. Judge FINCH says in his opinion (p. 48): "What "ever he obtained beyond his legacy he looked upon "as a bounty, bestowed upon equitable considera- "tions, and did not expect for a moment that he "was legally entitled, as his own, to all that was "offered and three times as much in addition." The executor however knew that the plaintiff was entitled to the lapsed legacy, and he knew that the plaintiff did not know it, and took the release from him without disclosing the truth. Upon this state of facts this court held that the release should be cancelled and set aside.

KERR ON FRAUD AND MISTAKE.

INADEQUACY. *P. 186.* Note,

"And the Courts have never decided as a broad principle, that mere inadequacy, UNCONNECTED WITH DIRECT FRAUD OR IMPOSITION OR CONCEALMENT, OR ADVANTAGE TAKEN OF EXTREME WEAKNESS OR GREAT NECESSITY should be distinct and independent ground for vitiating contracts.

BUT THE COURTS HAVE SAID THAT THE INADEQUACY MAY BE SO GROSS as to furnish strong, and even CONCLUSIVE PRESUMPTION of fraud, AND THAT IS THE WAY THE GROSSNESS OR INADEQUACY MAY AVOID A SALE.

186 Note. Wherever the Courts perceive that a sale of property has been made at a grossly inadequate price SUCH AS WOULD SHOCK A CORRECT MIND, THIS INADEQUACY FURNISHES A STRONG, AND IN GENERAL A CONCLUSIVE PRESUMPTION, THOUGH

THERE IS NO INDIRECT PROOF OF FRAUD, THAT AN UNDUE ADVANTAGE HAS BEEN TAKEN OF THE IGNORANCE, THE WEAKNESS, THE NECESSITY AND DISTRESS OF THE VENDOR. Butler *v.* Haskell, 4 Dessau, 651 ;

187. Inadequacy of consideration, if it be of so gross a nature as to amount in itself to conclusive and decisive evidence of fraud IS A GROUND FOR CANCELLING A TRANSACTION. In such a case the relief is granted, NOT ON THE GROUND OF INADEQUACY OF CONSIDERATION, BUT ON THE GROUND OF FRAUD AS EVIDENCE THEREBY. Cites many cases.

Releases Obtained by Duress—or Oppressive Conduct—Threats—Abuse of Position and power—will be Set Aside by a Court of Equity.

These agreements and releases were obtained by Ritch, Bulkley and Vaughan by oppressive conduct toward the sick widow, accompanied with threats, and by the abuse of their position and power as executors and trustees in control of the estate.

A court of equity will take into account all the circumstances of the case—not only the act and intention of the party, but *the circumstances under which the act was done.*

Kerr on Fraud and Mistake, 45.

In the case of *Sears* v. *Shafer* (6 New York, 268), it was thought by this court to be a material fact, in considering the validity of a release, obtained by a brother, who was the executor of his father's will, from his sister, who was a legatee of a sum of money, held by the executors in trust for her,

whereby she released her interest in remainder in a farm devised to her brother for life, that, at the time of executing such release, she was suffering from cancer, pronounced incurable by her physician, and was mostly confined to her bed enduring great pain and mental prostration.

"It may be stated as settled law, that whenever "there is great weakness of mind in a person ex- "ecuting a conveyance of land, arising from age, "sickness, or any other cause, though not amount- "ing to absolute disqualification, and the consider- "ation given for the property is grossly inadequate, "a court of equity will, upon proper and reason- "able application of the injured person, or his re- "presentatives, or heirs, interfere and set the con- "veyances aside."

Allore v. *Jewell*, *94 United States*, *506*.
Griffith v. *Godey*, *113 United States*, *89*, *95*.

Extreme weakness will raise an almost necessary presumption of imposition, even when it stops short of legal incapacity.

Harding v. *Wheaton*, *2 Mason*, *387*, *Story*, *J*.
Hall v. *Perkins*, *3 Wendell*, *626 Court of Errors*.
Green v. *Rosworth*, *113 New York*, *462*, *470*.
Weller v. *Weller*, *44 Hun*, *172*; *aff'd 112 New York*, *655*.
Jones v. *Greenwood*, *30 State Rep.*, *478*, *483*.
Barnard v. *Gantz*, *140 New York*, *249*, *255*.
Farnam v. *Brooks*, *9 Pickering*, *220*.

The evidence on this branch of this case will be found in the above statements of facts (V, *pp. 28-29; 31; 42-45; 55-58*). It shows that Mrs. Fayerweather was, for several years before her death, suffering from diabetes, a mortal disease, from which she afterwards died, July 16th, 1892. From the death of her husband, November 15th, 1890, until her own death, her bodily strength was considerably reduced, her condition was one of general depression. There were considerable physical depression, weakness and irritability, general nervous depression, and suffering from annoyances, but her mind was perfectly clear. Her disease was aggravated about the time of her husband's death and subsequently, pending the contest over the probate in the Surrogate's Court, it was very much aggravated (V, *fols. 2328-34; 2354; 2380-1; 2815; 2819; 2914-15*).

While Mrs. Fayerweather was in this condition, and on or about February 26th, 1891, Mr. Vaughan met her sister, Miss Joyce, in the Court House, after the adjournment of the Surrogate's Court where the probate case was on trial. He shook his fist in her face and said: "Miss Joyce, *I will fight* "*this thing as long as there is a dollar left of the* "*Fayerweather money*, and as long as I have a dol- "lar of my own private fortune; *and I want you* "*to tell Mrs. Fayerweather, and I mean every* "*word I say.*"

Miss Joyce immediately conveyed this message to Mrs. Fayerweather, telling her exactly what Mr. Vaughan said to her, and his manner. Mrs. Fayerweather was very much agitated and excited on hearing this, and said that Mr. Vaughan had it in his power to do so as long as he chose, and the best thing she could do was to settle the thing. She

was made ill and confined to her bed for several days in consequence of this message from Vaughan, and was attended twice daily by her physician. All the symptoms of her disease was aggravated, she produced a much larger quantity of sugar than previously, she did not sleep well and was restless and weak and vomited a great deal, and was nervous and excitable, and her general condition was very unfavorable. While she was in this condition she executed the agreement of March 5th, 1891. After that she improved rapidly, so that the settlement was physically a good thing for her (*fols. 2737-54; 2873-93; 2334-50; 2371-6; 2386*).

This evidence of Vaughan's conduct was not contradicted. And Doctor Irwin's testimony of Mrs. Fayerweather's condition was not contested (V, *fol. 2732*).

We have thus, so far as the widow was concerned, a case of *unfair advantage* and *coercion* added to the other reasons for setting aside her agreement and release. She was dependent upon these executors and trustees for her annuity and means of support (V, *fols. 1294-8; 2041-2; 2733*). Her annuity was payable "*in their discretion*" (*Will, 5th Clause, fol 3571*). It had not been paid (*2622-5*), neither had her $10,000 legacy (2681-5). She had been living since her husband's death upon credit, with nothing from his vast estate in their hands (*Supra, pp. 28; 31; 42 and* V, *fols. 1458; 2037-41; 2623-4; 2648-51; 2673-9; 2921-32*). She had to borrow money to pay her servants (*fols. 2733; 2624*). The executors took the ground that she could not have anything from the estate while she opposed the probate of the will and codicils. Even after the admission of the *will* to probate, Feb'y 25, 1891, they still withheld all money

from her. This condition of affairs worried her and aggravated her disease (*fols. 2378-80*). They knew it would do so, as plainly appears from the way Mr. Ritch talked to her, Dec. 11th, 1890 (*fols. 2681-5*). They knew her dependence on them, and they calculated with certainty, as the event shows, to coerce her into submission.

KERR, 143.

In order that there should be CONSENT, it is ESSENTIAL that the consent should be given WITH REFLECTION, WITH KNOWLEDGE, FREELY, WITHOUT RESTRAINT OR SURPRISE.

FRAUD, therefore; *whether* consisting in *mis*REPRESENTATION, *concealment*, VIOLENCE, CONSTRAINT, DURESS, *will nullify* CONSENT.

It is upon THIS principle that, when a person who, from his state of mind, AGE, WEAKNESS, OR OTHER *peculiar* CIRCUMSTANCES, IS INCAPABLE OF EXERCISING A FREE DISCRETION, IS INDUCED BY another to do any act which MAY TEND TO the INJURY OF himself or his representatives, THAT OTHER SHALL NOT BE ALLOWED TO DERIVE ANY BENEFIT FROM his improper conduct.

The EQUITABLE RULE IS of UNIVERSAL application that when a man is *not* a FREE agent, or is *not equal to* PROTECTING HIMSELF,—THE *Court will* PROTECT HIM. Cites many cases, including 10 How., 174; 3 Cow., 437; 5 Barb., 533; 2 Halst. Ch., 522, 677.

GREAT DISTRESS OF MIND and a proffer of assistance, ARE CIRCUMSTANCES that will be CONSIDERED in determining.

In *Ashley* v. *Reynolds*, 2 Str., 915, which may perhaps be called the LEADING CASE ON THIS SUBJECT, the plaintiff, who had pawned plate to the de-

fendant, was allowed to recover money unlawfully demanded of the plaintiff as a condition of allowing him to redeem. Said the Court, "We think also THAT THIS IS A PAYMENT BY COMPULSION; THE PLAINTIFF MIGHT HAVE SUCH AN IMMEDIATE WANT OF HIS GOODS THAT THE ACTION OF TROVER WOULD NOT DO HIS BUSINESS; where the rule *volenti non fit injui* is applied, IT MUST BE WHERE THE PARTY HAD THE FREEDOM OF EXERCISING HIS WILL, AND WHICH THIS MAN HAD NOT; WE MUST TAKE IT HE PAID THE MONEY RELYING ON HIS LEGAL REMEDY TO GET IT BACK AGAIN.

Beasley v. *McGrath*, 2, Schol. & Lef., 37, REDESDALE, L. Ch.:

"If ever there was a transaction which on the face of it spoke of IGNORANCE OF THE SITUATION OR THE INFLUENCE OF DISTRESS, this is one. On the evidence it is clear that SHE WAS IN GREAT DISTRESS AT THE TIME, BEING FORCED TO *borrow* TRIFLING SUMS FOR HER SUBSISTENCE.' PROTEST of no avail, 138 N. Y., 238.

(As at Bar.)

METCALF ON CONTRACTS, 1888. 29: "If one's goods or other property BE WRONGFULLY DETAINED, AND HE PAY MONEY SIMPLY TO OBTAIN POSSESSION, and NOT by way of adjusting the matter, he may RECOVER it back. Shaw *v.* Woodcock, 7 B. & C., 84, 85, and other cases. But in England such recovery is had on the ground that the money was not paid voluntarily, BUT UNDER COMPULSION, and NOT on the ground that it was paid under duress, as TECHNICALLY understood."

SHAW v. WOODCOCK, 7 B. & C., 84, BAYLEY, J.: "If a party has in his possession goods or other property belonging to another, and REFUSES TO deliver such property to that party UNLESS the latter PAYS HIM A SUM OF MONEY WHICH HE HAS NO RIGHT TO RECEIVE, and the latter, in order to OBTAIN POSSESSION of his property, pays that sum,—the money so paid IS A PAYMENT MADE BY COMPULSION, and MAY BE RECOVERED BACK."

85. HOLROY, J. "Upon the question whether a payment be VOLUNTARY or not, the law is quite clear. If a party making the payment IS OBLIGED TO pay, IN ORDER to obtain possession of things TO WHICH HE IS ENTITLED, the money so paid is NOT A VOLUNTARY, but a COMPULSORY PAYMENT, and MAY BE RECOVERED BACK."

DURESS.

1824. *Wilkinson* v. *Johnson*, 3 B. & C., 434, ABBOTT, C. C.: "The general rule of law is clear and not disputed, viz., that money paid under A *mistake* OF *facts* MAY BE *recovered* BACK AS BEING PAID WITHOUT CONSIDERATION."

3 Smith, Lead, Cas, 9th Ed., 1705: "In the United States in numerous cases where the defendant knowing THAT NO DEBT EXISTS, * * * by duress of goods * * and without giving the plaintiff a day in Court, COMPELS HIM AS A *condition of* DELIVERY OR *release* to pay money, the payment when made *under protest* is deemed to have been made under compulsion or *duress* AND *may be* RECOVERED BACK, *especially* WHERE THE DETENTION IS ATTENDED WITH CIRCUMSTANCES OF *hardship* OR *serious inconvenience* TO THE OWNER. 114 Mass., 364; 32 Conn., 358; 18 Ohio, 548; 7 Greenl., 134; 28 Vt., 370; 106 Mass., 1; 34 Pa., 142; 1

Bay., 13, 470; 45 Mich., 569; 41 Ind., 312; 34 Minn., 384; 10 How., 342, Maxwell v. Griswold.

Tolhurst v. *Powers*, *133 N. Y.*, 462, FINCH, J.: "Thereafter Ball and Powers requiring a delivery of the *dynamo*, the plaintiffs (Mfrs.) undertook or *threatened to retain the possession* till the original debt should be paid. THAT they had *no* right to do. Their primary lien was lost, *by* the *delivery*, and they acquired *no* new one by reason of the *repairs* which were paid for. Such refusal to surrender the position was AN ABSOLUTE WRONG, *without any color of right* ABOUT IT. * * * THEY GAVE UP *no* RIGHT WHICH THEY *had* AGAINST ANY ONE.

BUT EXTORTED THE PROMISE BY A *threat* OF WHAT WOULD HAVE BEEN IF EXECUTED, A WRONGFUL VERSION. DOING WHAT THEY *were already* BOUND TO DO FURNISHED NO CONSIDERATION FOR THE PROMISE.

A Compromise obtained by Suppression of the Truth—False Representations—Undue advantage, will be set aside.

KERR, on Fraud and Mistake (p. 124):

"To constitute a fair compromise of a doubtful "right the facts, creating the doubt, should be "equally known by all the parties. There must "be a *full* and fair communication of all material "circumstances affecting the questions, which "form the subject matter of the agreement, which "are *within the knowledge of the* several parties, "and which the others have *not* reasonable means "of knowing, *whether such information be asked* "*for* by them *or not*. There must not only be

"good faith and honest intention, but *full dis-*
"*closure*, and, *without* full disclosure, honest
"intention is *not* sufficient. A party to a compro-
"mise, who has knowledge of a fact, must not
"take upon *himself* to decide that the suppressed
"fact is immaterial, if it could, by any possibility,
"have any influence upon the decision of the other
"party. * * * A compromise can*not* be approved
"of where one party knows *only so much* of his
"rights as the *other* party *chooses to apprise* him of
(p. 125). "If, under the circumstances of the case,
"it was the duty of one party to see that the nature
"of the transaction was fully explained to the
"other, these principles apply with peculiar
"force."

See also:

Adair vs. *Brimmer*, *74 N. Y.*, *554*.

In *Walker* vs. *Symonds* (*3 Swanston*, *72*) Lord ELDON said:

"*He, who, undertaking to give information,*
"*gives but half information, in the doctrine of*
"*this court, conceals.*"

Mr. BEACH, in his work on *Modern Equity Jurisprudence* (*Vol. 2, § 1005*) says: "*To make*
"*a compromise of any value the parties must be at*
"*arms length, on equal terms, with knowledge,*
"*and with sufficient advice and protection.*"

Mr. HARRIMAN, in his work on *Elements of the Law of Contracts* says (*p. 247*): "*An omission to*
"*communicate facts, which one person is bound to*
"*communicate to another, amounts to a represen-*
"*tation that those facts do not exist.*"

Mr. PERRY, in his work on *Trusts* (4th Edition § 179) says: "There are also cases where a party
"must not be silent upon a material fact within

" his knowledge, although he stands in no relation " of trust, or confidence. *Silence as to such facts* " *under such circumstances, would be equivalent* " *to a positive affirmation that no such facts ex-* " *isted.*"

In *Stewart* v. *Wyoming Ranch Co.* (128 U. S., 388), GRAY, J., says: "A suppression of the truth " may amount to a suggestion of a falsehood, and " if, with an intent to deceive, either party to a " contract of sale conceals, or suppresses, a mate- " rial fact, which he is, in good faith, bound to " disclose, *this is evidence of, and equivalent to, a* " *false representation, because the concealment or* " *suppression is, in effect, a representation that* " *what is disclosed is the whole truth.*"

Mr. HILL, in his work on Trustees says (*p. 148*): " When the concealment amounts to a willful " suppression of facts, by a party *for his own bene-* " *fit*, and a consequent injury of another, under " circumstances which rendered it his duty to have " disclosed these facts to the other party, and in " respect of which he could not innocently have " remained silent, it is beyond all question that " such *undue concealment* will amount to a case of " fraud."

These rules apply directly and with full force to releases.

" Mr. GODEFROI, in his work on *Trusts* says (*p. 485 foot*): " A release can, of course, never stand, if " obtained by pressure, or undue influence, or " ignorance of rights."

On page 486 he cites the case of a release, given by a lady to her trustee before marriage, under an erroneous view of her rights. More than twenty years after it was set aside, and the court

held that it was unnecessary even to allege that the trustee who took it was guilty of fraud.

Gandy v. *Macaulay*, *L. R. 31, Ch. Div., 1.*

A purchase, or other transfer, from a person interested in an estate, to those having custody and control of the estate, obtained by the latter denying, concealing, or misrepresenting the existence, or value of the interest so purchased, or transferred will always be set aside in equity, at the suit of the party injured thereby.

Thomson v. *Eastwood*, *L. R. 2 App. Cases, 215.*
Dickson v. *Paterson*, *160 U. S., 592.*

Ignorance, mistake, misapprehension, omission to explain, and many other like conditions are quite as effective as actual and intended fraud, to set aside releases in equity.

Leach v. *Leach*, *65 Wisconsin, 285.*
Farnam v. *Brooks*, *9 Pickering, 220, 233.*
Huguenin v. *Baseley*, *14 Vesey, 273.*
Landsdowne v. *Landsdowne*, *2 Jac & Walker, 205.*

A release obtained by threatened protracted litigation will be set aside.

Fortunately the law has dealt with cases like this before; and it takes hold of them *with a firm hand.*

In Lonergan *vs.* Buford, 148 U. S., page 590, foot, the Supreme Court of the United States, Justice BREWER writing the opinion, says:

"In Stenton vs. Jerome, 54 N. Y., 480, the defendants, who were stockholders, held two United States bonds belonging to the plaintiff, which they threatened to sell unless she paid a balance CLAIMED by them on account. On page 485 the Court says:

"Great stress, however, is laid upon the payment by the plaintiff of the balance shown by the account as rendered, to be due from her.

This payment was in one sense voluntary, AS SHE WAS *not* COMPELLED BY *physical* DURESS to pay it. But the defendants held her two bonds, WHICH THEY *threatened* AT ONCE TO SELL *unless* SHE WOULD PAY THIS BALANCE. *She had great need* FOR THE BONDS; AND COULD NOT *well* WAIT *for the slow process of the law* TO RESTORE THEM TO HER; and she paid this balance, not assenting to the account; and not assenting that it was JUSTLY due for the sole purpose of releasing her bonds.

Under *such* circumstances, *it is well settled* THAT THE LAW DOES *not* REGARD A PAYMENT AS *voluntary*."

In Harmony *vs.* Bingham, 12 N. Y., 99, 117, it is said, "If a party has in his possession goods or other property belonging to *another;* and *refuses to* deliver such property to that other *unless* THE LATTER PAYS HIM A SUM OF MONEY WHICH HE HAS *no* RIGHT TO RECEIVE; and the latter, *in order* TO OBTAIN POSSESSION OF HIS PROPERTY, pays that sum;

THE MONEY SO PAID IS A PAYMENT *by com-*

pulsion. And he cites a number of cases and decides in accordance with the same principle.

Compare the treatment of Mrs. Stenton, and the slight annoyance she was put to, and would have been put to, with the treatment of *Mrs. Fayerweather*, it will be seen whether the same principle applies to both cases.

Peyser v Mayor, 70 N. Y., 501, FOLGER, *J.*: "I have spoken of *coercion* in fact and coercion by law. By the first I mean that duress of person or goods where present liberty of person *or immediate possession of goods is so needful* AND DESIRABLE AS *that an action or proceeding at law* TO RECOVER THEM *will not at all answer the pressing purpose.* * * *

The cases of Maxwell *v.* Newbold, 18 How., U. S., 511, and Harmony *v.* Bingham, 12 N. Y., illustrate *what is duress of* goods. * * * *The oral protest was of no import save to show that there was not an assent to the proceedings.* Flower *v.* Lance 59 N. Y., 610; 120 N. Y., 365; 132 N. Y., 28.

By violating their agreement to convey the Tomb of Mr. Fayerweather, Ritch, Bulkley and Vaughan have voided this release.

One part of the consideration for the widow's release, exceedingly important and a great induce-

ment to her, was the transfer of her husband's tomb to her.

That these three men agreed to (fol. 411, App. of Exhibits) in these words:

"And we also agree to execute to her a deed of the lot in Woodlawn Cemetery, intended for the interment of the remains of Mr. Fayerweather."

Relying upon this promise implicitly, she signed the release.

To this day said three men have never kept their part of this agreement.

But on the contrary have deliberately put it out of their power to do so.

And have obtained from the Supreme Court—wholly against the wishes of her legal representative—an order to convey it to *another*.

Such a flat intentional violation of a contract voids it.

Rescission, Lawson on Contracts (1893), § 448: "But, it seems to be agreed by all Courts, that the right of *Recsission* MAY BE EXERCISED on failure to perform a PART or INSTALMENT of the contract:

First.—Where by the *express* terms or the contract, performance of EACH is made *a condition precedent* to the continuing obligations of the contract; or WHERE IT IS EVIDENT FROM THE NATURE AND CIRCUMSTANCES OF THE CASE THAT THE REGULAR PERFORMANCE OF EACH STIPULATION *was an inducement* TO THE CONTRACT, *and so goes to the root of the matter as to make its performance a condition of the obligation to proceed in the contract.*

Second.—Where the party in default *expressly*

announces, or *his conduct* IS SUCH AS TO EVINCE AN INTENTION TO ABANDON the contract OR A DESIGN NO LONGER TO BE BOUND BY ITS TERMS.

Refusing to pay at the time called for by a contract TO DELIVER ARTICLES falls under this exception.

Blackburn & Reilly, 47 N. J. (L.), 308:

DIXON, J.—"The *rule* is that defaults by one party in making *particular* payments or deliveries will not release the other party from his duty to make the other deliveries or payments stipulated in the contract, *unless* the CONDUCT of the party in default BE SUCH AS *to evince an intention to abandon* THE CONTRACT OR A *design* NO LONGER TO BE BOUND BY ITS TERMS."

Dwinell *v.* Howard, 30 Me., 262; SHEPLEY, C. J.:

"When *payment* is by agreement to be *made* for goods sold, AT THE TIME OF DELIVERY, they DO NOT BECOME THE PROPERTY OF THE PURCHASER UNLESS PAYMENT BE MADE OR TENDERED, or there be a waiver of the right to exact it.

14 Me., 400; Leven *v.* Smith, 1 Denio, 243."

Dows *et al. vs.* Kidder *et al.*, 84 N. Y., 127, DANFORTH, J.: "There was an agreement to sell, but payment was to be made in cash *upon delivery*,

Payment *was thus* MADE A CONDITION PRECEDENT, and *until* THE CONDITION WAS PERFORMED THE *title could not be affected*. Leven vs. Smith, 1 Den., 571.

E. S. T. F. Co. vs. Grant, 114 N. Y., 44. PARKER, J.: "The agreement, however, did *not* provide, *in express terms*, that payment should be made on

delivery, *neither* did it provide that payment and delivery should *not* be concurrent.

The rule in such case is that the INTENT of the parties MUST CONTROL. If it can be inferred from the acts of the parties and the CIRCUMSTANCES SURROUNDING the transaction that IT WAS THE INTENT THAT DELIVERY and PAYMENT *should be concurrent* ACTS, THE TITLE WILL BE DEEMED TO HAVE *remained* in the VENDOR UNTIL THE CONDITION OF PAYMENT is COMPLIED WITH. *Benj. on Sales* (Am. Ed.), § 330 and notes; Leven vs. Smith, 1 Denio, 571, 48 N. Y., 399; 5 *Id.*, 41; 36 *Id.* 586:

The Doctrine of Election is not applicable in this Case.

"No principle is better settled than that a person "cannot take as heirs-at-law, contrary to a will duly "executed, and also take any provision under the "will, for the manifest reason that the intention of "the testator is frustrated. The ordinary course is "to put the heir to his election. As to the infants "the court makes the election for them."

Hawley v. *James*, *16 Wendell, 61; 254.*
Thompson v. *Clendenning*, *1 Sand. Ch., 387; 397.*
Arnold v. *Gilbert*, *3 Sand. Ch., 531; 563.*
Chipman v. *Montgomery*, *63 New York, 221.*

To charge a party with an election under a will it must be shown not only *that he knew all the facts*, but also that he intended to make an election.

Pomeroy's Equity Jur., Vol. 1, §§ 512; 515.
Story's Eq. Jur., Vol. 2 § 1097.
Kerr on Fraud and Mistake, 451, 453.
Terry v. *Munger, 121 New York, 161, 167, &c.*
E. C. F. Co. v. *Harsee, 103 New York, 25.*
Sawyer v. *Wood, 3 John's Ch., 416, 421.*

A trustee, or person standing in a confidential relation, cannot take advantage of an election, or an estoppel, against his *cestui que trust*, except upon proof of *complete disclosure* of *all* the facts and *deliberate uninfluenced* choice on the part of the latter.

Jones v. *Jones, 120 New York, 589.*
Aitkin v. *Kellogg, 39 Hun, 256.*
Stuart v. *Waterhouse, 10 Yerger, 94.*

Kerr, 505. The doctrine of ELECTION is not merely applicable to a willful but also to a *mistaken disposal of* the property of another.

Serrell, 15. AN ELECTION MADE BY A PARTY UNDER A *mistake* OF FACTS OR A MISCONCEPTION AS TO HIS RIGHTS IS NOT BINDING IN EQUITY. In order to constitute a *valid election*, the act done MUST BE WITH A FULL KNOWLEDGE OF THE CIRCUMSTANCE OF THE CASE AND THE RIGHT TO WHICH the person put to his election *was entitled.*

Wintour *v.* Clifton, 21 Beav., 468.

In order to presume an *election* from the acts of

any person, THAT PERSON MUST BE SHOWN TO HAVE HAD A FULL KNOWLEDGE OF ALL THE REQUISITE CIRCUMSTANCES, AS TO THE AMOUNT OF THE DIFFERENT PROPERTIES, HIS OWN RIGHTS IN RESPECT OF THEM, ETC.

Wake *v.* Wake, 1 Ves. Jr., 335, and the other cases mentioned.

1 Sw., 381, note. A PERSON WHO HAS *elected* UNDER A MISCONCEPTION IS ENTITLED TO MAKE A *fresh* ELECTION. Kidney *v.* Coussmaker, 12 Ves., 136 ; Jarman on Wills, Vol. 1, p. 435.

291. No valid instrument which effectually conveys property CAN LOSE *its effect* MERELY BY REASON OF ITS FRAUDULENT CANCELLATION OR *destruction.* Donalson *v.* Gillott, L. R., 3 Eq., 277.

Where there has been a spoliation or suppression of instruments *which might have thrown light upon a suit, everything* WILL BE *presumed against* THE PARTY, by whose agent such spoliation and suppression have been practised, AND EVERY PRESUMPTION WILL BE MADE IN FAVOR OF THE PRIMA FACIE RIGHTS OF THE *other* PARTY. Bowles *v.* Stuart, 1 Sch. & Lef., 222 ; Hampden *v.* Hampden, 1 Bro. P. C., 252.

P. 319. Length of time can however have no effect between trustee and *cestui que* trust, except the trusts are properly executed. Franks *v.* Bollands, 37 L. Jour., Ch. 155.

In this case, however, the receipt by the widow and next of kin of the provision made for them in this will, does not raise any case for an election, or estop them from charging the executors with a trust *ex maleficio*, in the residuary estate, or from setting aside their releases, for the *obvious and satisfactory* reasons :

1st. That, in so far as the residuary devise and

bequest violate, or attempt to evade, Chapter 360, Laws of 1860, it is avoided by law and not by the act of the parties, and the widow and next of kin simply take the portion of the devise and bequest which the law confers upon them.

2d. In so far as the residuary devise and bequest are void because the secret trust, attempted to be created thereby, is indefinite and therefore incapable of execution, the widow and next of kin are simply substituted as beneficiaries in place of those who cannot be ascertained.

It is the statute which takes the invalid gift away from the prohibited legatees, and confers it upon the widow and next of kin, and t e law does not require that they shall surrender what the will gives them in order to be qualified to take what the statute gives them.

In *Read* v. *Williams* (125 New York, 560), as appears by the will and appeal book, each of the plaintiffs had received a large money legacy under the will. But this was not held to be any obstacle to full relief to them against the illegal disposition of the residue of the estate under the same will.

Kerr on Fraud and Mistake.

453. AN ELECTION made by a party UNDER A MISTAKE OF FACT OR A MISCONCEPTION AS TO HIS RIGHTS IS NOT BINDING IN EQUITY. IN ORDER TO CONSTITUTE A VALID ELECTION THE ACT DONE MUST BE WITH A FULL KNOWLEDGE OF THE CIRCUMSTANCES OF THE CASE AND THE RIGHT TO WHICH THE PERSON PUT TO HIS ELECTION WAS ENTITLED.

In order to presume *an election* from the acts of any person, THAT PERSON MUST BE SHOWN TO HAVE HAD A FULL KNOWLEDGE OF ALL THE REQUISITE

CIRCUMSTANCES AS TO THE AMOUNT OF THE DIFFERENT PROPERTIES AND HIS OWN RIGHTS IN RESPECT OF THE—&c. 1 Ves., 325, and fifty other cases.

Dismissal of Action of Reynolds as Executor vs. Ritch.

It was proved in this case that the widow of Daniel B. Fayerweather, shortly before her death, began an action in the Supreme Court to set aside her said agreement and release. After her death said action was revived in the name of her executors, Mr. Reynolds and Mr. Bearc'sley. Mrs. Achter and Mrs. Emma S. Fayerweather subsequently became plaintiffs in that action, with the widow's executors, and they asked the Court to set aside their agreements and releases.

That action was subsequently dismissed upon failure of the plaintiffs to appear, *but such dismissal was by default and not upon the merits.* It was dismissed to make way for this action.

The judgment of dismissal, although dated April 25th, was finally entered June 12th, 1893, and about the 20th day of June, 1893, this action was commenced, and the plaintiffs in said action were made defendants in this action. They paid up the costs of said former action, and served their answer upon all the parties as required by Section 521 of the Code, demanding affirmative relief in this action.

It was not contended on the argument of this case that this judgment of dismissal was any bar to the granting of affirmative relief to these defendants in this action, if otherwise entitled thereto.

It was not received in this case as evidence of an adjudication (*fol. 2324*).

Section 1209 of the Code provides as follows:

"§ 1209. A final judgment, dismissing the complaint, either before or after a trial, rendered in an action hereafter commenced, does not prevent a new action for the same cause of action, unless it expressly declares, or it appears by the judgment roll, that it is rendered *upon the merits.*"

The effect of this section has been to extend to all cases the common law rule, as laid down in *Wheeler* v. *Ruckman* (51 New York, 391, affirming 7 Robt., 447). Since its enactment the dismissal of the complaint in an action for equitable relief, is not a bar to a new action for the same cause, unless it expressly declares or it appears by the judgment roll, that it was rendered on the merits.

McCullough v. *Vibbard*, *16 State Rep.*, *1012.*
Forbes v. *Chichester*, *36 State Rep.*, *248; 251.*

The judgment in said action shows that the complaint was not dismissed on the merits (*fols. 2609-16*). Hence it is no bar to the affirmative relief prayed for in this action by the then plaintiffs, who have now been made defendants.

No Reply to Our Counterclaim in Amherst v. Ritch.

The right to have the agreement and releases adjudged void and cancelled, and to recover the distributive shares of the widow and nieces, is an affirmative cause of action in equity for a rescission.

Gould v. *Cayuga County Bank*, *99 New York*, *333.*
Bosley v. *National Machine Co.*, *123 New York*, *551.*

By making the widows executors and the nieces defendants in this action, and claiming their distributive shares under these releases, the plaintiffs called upon us to assert our rights.

In order to have affirmative relief, setting aside these releases in this action, we were bound to plead the facts constituting our cause of action, as a counterclaim, and to demand such relief thereon (*Code*, §§ *500*, *501*, *502*, *503*, *509*).

We were required to serve our answer not only on the plaintiffs but the defendants (*Code*, *521*). We did so (*fol. 25*).

They were all bound to reply to said counterclaim, *otherwise it stood admitted as true*, and we were entitled to judgment upon it (*Code*, §§ *514*, *515*, *522*). The plaintiffs certainly were bound to *reply* (*Ibid.*).

No reply to said counterclaim has been received from any party, plaintiff or defendant. It therefore stands admitted.

Let us see if this counterclaim did not meet every requirement of the Code:

1st. It *tended to* diminish plaintiffs' recovery.

2d. It was a cause of action "arising out of the transaction set forth in the complaint as the foundation of the plaintiffs' claim." The plaintiffs claimed title under it.

3d. It was a transaction "connected with the subject of the action"—the residuary estate.

4th. It was a cause of action against the plaintiffs. If we had brought a suit in equity to cancel these releases these plaintiffs would have been proper and necessary parties thereto.

5th. It was a cause of action in favor of these defendants.

6th. It was a cause of action upon which we could have a separate judgment against these plaintiffs in this action. If we had not served our answer on our co-defendants we were still entitled to have these releases set aside so far as these plaintiffs were concerned.

Affirmative Relief to this Defendant.

Section 1204 of the Code provides as follows:

"§ 1204. Judgment may be given for or against one or more plaintiffs and for or against one or more defendants. It may determine the ultimate rights of the parties on the same side, as between themselves; and it may grant to a defendant any affirmative relief to which he is entitled."

Section 521 of the Code provides as follows:

"§ 521. Where the judgment may determine the ultimate rights of two or more defendants, as between themselves, a defendant, who requires such a determination must demand it in his answer, and must, at least twenty days before the trial, serve a copy of his answer upon the attorney for each of the defendants to be affected by the determination, and personally, or as the Court or Judge may direct, upon the defendants, so to be affected, who have not duly appeared therein by attorney. The controversy between the defendants shall not delay a judgment to which the plaintiff is entitled, unless the Court otherwise directs."

This practice has been followed in this case and the answer of these defendants has been duly served upon all the other parties as required by § 521 of the Code (*fols. 25; 3632*).

When an action involves the enquiry to whom a sum of money belongs, or who is the rightful owner of specific property, all claimants are necessary

parties, and the Court may render judgment in favor of certain defendants against the plaintiffs, and co-defendants, whose answers, demanding affirmative relief, have been properly served.

Durham v. *Lee*, *87 New York*, *599*.

"The general rule in equity requires that all "persons interested in the subject of the action "should be made parties, in order to prevent a "multiplicity of suits and secure a final determination of their rights."

Mahr v. *Ins. Society*, *127 New York*, *452*; *460*.
Turner v. *Conant*, *18 Abb. N. C.*, *160*.
Price v. *Holman*, *17 State Rep.*, *572*.

The rule laid down in *Smith* v. *Hilton* (50 Hun, 236; 19 St. Rep., 340), has no application in this case.

It was claimed by the counsel for Messrs. Ritch, Bulkley and Vaughan, and their donees, that the executors of the widow had no standing in Court to set aside her release and have affirmative relief, because she had taken no action in her lifetime for that purpose.

This assumption is contrary to the evidence, for it was proved on the trial that the widow, shortly before her death, brought an action for that purpose, which was afterwards revived in the names of her executors, and dismissed by default just before the commencement of this action.

But it was not necessary that the widow should have taken any action to set aside this release in her lifetime. The right to maintain an action for such relief *is expressly conferred by statute* upon

the personal representatives of a party so defrauded. *Laws of 1858, Chapter 314.*

Love v. *Dierckes, 16 Abb. N. C.. 47; 58–59.*

Derrick v. *Emmen, 38 State Rep., 481.*

And when, as in this case, the executors of the widow and the next of kin of the testator are made parties defendant, and a judgment asked for excluding them from participation in the residuary estate, they certainly have the right, not only to defend themselves, but to counterclaim for any affirmative relief to which they are entitled in order to obtain their shares therein.

The Share of Mrs. Beardsley.

Mrs. LUCY J. BEARDSLEY, one of the nieces and next-of-kin, who had a legacy of $100,000, under the will of Mr. Fayerweather (V, *fol. 5373*), and another $100,000, as a *donatio causa mortis*, carried into the deed of gift (*fols. 1982–4; 3610*), executed the agreement of March 5th, 1891, by her husband Morris B. Beardsley, acting as her attorney in fact (*fols. 1411 16*). *It does not appear that she has executed any release.* None was offered in evidence.

She was made defendant in this action, but has neither appeared, nor answered (*fols. 1427–32*). So far as appears, she has been contented with the $200,000, she has received. The question, therefore, arises what is to be done with her distributive share?

We respectfully submit that it should be awarded to her. She has never released it. As to her, the agreement of March 5, 1891, was wholly *without*

consideration. She took her $200,000, by force of the will and *donatio causa mortis* and not by the deed of gift.

If, however, the agreement of March 5, 1891, to release it to the donees under the deed of gift, is held binding upon her in the absence of any effort on her part to set it aside, and the case is to be treated the same as if she had executed a sufficient release, under that agreement, the question arises, who is entitled to her share?

If she had been paid anything for it, the share should be awarded to those who furnished the consideration. For example, if she had been paid $200,000, as purchase money, from the residuary estate, the balance of her share would belong to the twenty colleges and to these defendants in the proportions that they own the residuary estate, or contributed from it to pay the $100,000.

But she was paid nothing for it. The agreement of Ritch, Bulkley and Vaughan, of March 5, 1891, was the only consideration for Exhibit 8 of the same date, the agreement of the widow and nieces (V, *fols. 1411-25*). Exhibit 9 gave nothing to Mrs. Beardsley (V, *fols. 1418-25*). So far as she was concerned the transaction was a *gift* of her distributive share, an out and out present of it to the donees under the deed of gift of Feby. 24th, 1891.

We do not believe that she ever intended to make this present of about $400,000, which was rightfully and absolutely her own property, to these numerous colleges and hospitals, which are named in that deed of gift.

We submit that in equity she ought now to be allowed to say whether she will take her distributive share, or confirm the gift of it to them. Of

course, if she confirms the gift, it should go to her intended donees.

We are unable to see any ground upon which the General Term decision can stand, that it should go to the twenty colleges. They never had any title to it, *or their trustees never paid anything for it;* she had never given it to them, nor to anybody else. *The Supreme Court has taken her distributive share* which she agreed to release to the *donees* under the deed of gift, and made a *present of it to the twenty colleges.*

The Motion to Amend the Remittitur.

Defendants claim that the denial of this motion was a decision by the N. Y. Court of Appeals that the widow and nieces had *had* due process of law.

Point III of Messrs. Root and Bishop reads thus:

"The idea that the appellants have not had their rights FULLY CONSIDERED AND ADJUDGED is erroneous."

But Justice Truax swears THAT HE DIDNOT CONSIDER the validity.

Point V. States that we in effect asked the Court to presume that Justice Truax did *not* determine the issue of the validity, because he made no finding upon that ground.

But he *swears* that he did *not* consider that issue.

Point VI. States that the decision *necessarily involved* a decision against the contention that the releases were invalid.

But Justice Truax swears that he did *not* consider that issue.

And, as already seen, the decision of that issue was NOT *necessarily involved.*

It was not involved *at all.*

But the decision was upon a ground INCONSISTENT WITH any such decision.

They cite cases as to the old law, where many findings were made.

But none as to this *new* law where *but one* finding was made.

They said that besides this one finding we should have asked another one.

But this new law provides for *one. Not more than* one.

The Court filed such a decision.

It did *not* refer to the issue as to the *validity.*

The law—soon repealed—made no provision for an *additional* finding.

Its purpose seems to have been expressly to do what it says—namely, to file *not* a *set of* findings;

But, in their place, a *single* one.

Not *retail* findings.

But ONE *wholesale* or *universal* one.

If the Court did not try an issue that it had been pressed to;

And the single exception provided by this law carried up ALL questions of law and fact upon appeal;

why did it not also take up *this* question?

The General Term had the record before them.

They saw the opinion and decision of Justice Truax.

They saw that they were upon a ground inconsistent with the trial of this issue.

So *they* decided this issue themselves.

Where *they* obtained *power* to do so and to sit as a Court of original jurisdiction;

And the effect of their act,—is discussed by ex-Chief Judge Andrews in his brief filed herein.

They claim that the denial of this motion was a decision that we had *had* due process.

If the Trial Judge *never tried the issue.*

And the General Term *had no power to* do so;

As the decision of this *motion* fails to state upon what grounds it rested,—

How does *that* hold that we have had *due process?*

Does it show *upon what ground* it was reached?

Their briefs are silent upon the question of due process.

But those of Messrs. Parsons and Bovee, urged that the Court of Appeals had no power to mandamus a trial Judge to consider an issue.

How does showing that the Court of Appeals *lacked that* power determine or demonstrate that we have *had* due process of law?

The fact remains undisturbed,—sworn to by the Trial Judge himself,—that he did NOT consider this material and highly important issue.

It was left *un*considered then by the trial Court.

If the General Term, seeing the omission, took up the omitted issue and decided it.

Until it is shown to be a Court of *original* jurisdiction,—what power had *it* to decide that issue?

Mr. Bovee is sure that we *waived* our right to have it tried. But as he and all other counsel for defendants urged that it *had been* tried;
and some of them,—as already seen,—have not hesitated to *swear* so;
and as Justice Truax has sworn that he did NOT consider this issue;
just how would our asking the General Term to consider it give that Court *jurisdiction* so to do?

Since when can the jurisdiction of a Court be changed by stipulation of counsel?
If two citizens of the same State stipulated to try their cause in a Circuit Court of the United States,—
How much jurisdiction would *that* give?

The Cross-Bill is Germane to the Bill.

Kingsbury v. Buchner, 134 U. S., 677, HARLAN, J.:

> "*The subject-matter* of the original bill so far as she was concerned, *was the* TITLE *and ownership of the property* conveyed by the office May 1861.
> The plaintiff claimed title under that deed and by inheritance from his father. Mrs. Buckner claimed it under the same deed, but she averred that it was a trust deed.
> *The allegations of the cross-bill related to that property*, and, in answer to the plaintiff's demand that his title to it be confirmed she demands that his trust created by the deed of 1861 be declared, and her ownership established as against the plaintiff.
> *It is true that the cross-bill alleged additional facts, but its subject-matter was not the*

less, for that reason, germane to that of the original bill. Story's Eq. Pl. S. 389-392; Daniells, Ch. J., Pr. 1548; Underhill v. Van Courtlandt, 2 Johns. Ch. 339, 345; Hurd v. Case, 32 Ills., 45-49."

BEACH v. Wright, 131 U. S., 317, FULLER, J.:

> They asked no relief against complainant, BUT AFFIRMATIVE RELIEF AGAINST THEIR CO-DEFENDANTS, the sureties; and, UNDER SUCH CIRCUMSTANCES, CROSS bills ARE NECESSARY."

Smith's Ch. Prac., 196.

> It frequently happens, and particularly if any question arises BETWEEN TWO DEFENDANTS to a bill, that THE COURT CANNOT MAKE A COMPLETE DECREE WITHOUT A CROSS BILL, OR CROSS BILLS to bring EVERY matter in dispute COMPLETELY before the Court."

The purpose of this suit is a single one, to decide who owns this residuary estate.

Which is better—which is the course that Equity commands—that *all* who have or claim an interest shall ask the Court for it in *one* suit, or in *several?* That the cause shall be tried as one—and but once, or a number of times, in a number of parts, on substantially the same evidence over and over?

As this Court said in Payne v. Hook, 7 Wall., 430:

> "A Court of Equity does not act in *that* way. In disposing of a case so as to END litigation, NOT to *foster* it; to DIMINISH suits, NOT to *multiply* them.

1884. Carlton *et al.* v. Ins. Co., 72 Ga., JACKSON, C. J.:

> "Having filed the bill *to ascertain who were*

legally interested in the fund, as well when increased as at its present stage; and having made those various classes parties to it, upon what principle rests the idea that these cross-bills are not germane we cannot see" (cites 2 Daniell, 1548). "These cross-bills bring these points *germane to the very core of the bill*, before the Court."

Remer v. McKay, 68 Fed., 165 BLODGETT, J.:

"The complainant, having come into a Court of Equity for relief, the defendant may, it seems to me, appropriately make this application for relief *by attacking complainant's title*, and saying that complainant has in equity *no* title to the land in question, *but that the real and equitable title is in the defendant*; that the complainant has no standing in a Court of Equity to maintain and be protected in a title held *in fraud* of the *defendant's rights*.

The case made by the cross-bill seems to me an appropriate defence to the complainant's case, and one that, if sustained by the proof, would show the *defendant* entitled to the relief asked.

If therefore appears to me that the cross-bill is entirely germane to the case made by the original bill, and that the exceptions to the answer, and the demurrer to the cross-bill, should be overruled."

Greenwalt *v.* Duncan *et al.*, 16 Fed., 613, TREAT, J.:

"The defendant, who has been brought into Court to have a deed standing in her name set aside as a cloud upon plaintiff's title, has a *right* to have the *whole* controversy between her and the plaintiff determined; and if it so happens that her title is the *real* one, and this plaintiff's invalid, *to obtain a decree accordingly*.

Nelson *v.* Hatch *v.* Dunn, 15 Ala., 513:

"It is true the allegations of the cross-bill must relate to the subject matter in controversy in the original bill; but *the rule does not*, as is supposed by this counsel, *restrict* its office *so as to confine it* to the ISSUES in the *orginal* cause."

That the basis of relief sought by the cross bill differs from that of the main bill does not matter.

Bates on Federal Equity Procedure, page 428.

"The rule does *not* mean that the cross-bill should state no facts not stated in the original bill; nor does it mean that the plaintiff in the cross-bill can assert no rights in the subject-*matters* of the original suit not conceded to him in the original bill; for *if such were the meaning of the rule, a cross-bill would be utterly useless and nugatory.*

All that is required is, that the cross-bill shall not go outside of the matters embraced in the original bill, and introduce new and distinct matters *not involved* in the original *suit.* But the plaintiff in the cross-bill *may allege additional facts* connected with the subject-matter of the original (at bar the TITLE AND OWNERSHIP OF THE PROPERTY; see Kinsbury v. Buckner [*supra*] by Harlan, J.), *and may assert any rights* he may have in the same *arising out of the facts so alleged*, and pray for the *appropriate* relief.

While it is true that the cross-bill must grow out of the matter alleged in the original bill, *it is also true that the very object and purpose of the cross-bill* is to bring the WHOLE matter in dispute before the Court, so that there may be a COMPLETE decree *touching* the subject-matter of the suit, and *full* and *complete* justice done to ALL parties; and if the plaintiff in the original bill does not *fully* state *all* the facts and circumstances connected with the subject-matter in controversy, *but omits facts which*,

if alleged, would show a right in a defendant, entitling him to relief AGAINST either the plaintiff or A CO-DEFENDANT, *such omitted facts, however extended and voluminous, may be stated by the defendant* in a *cross*-bill, and the appropriate relief demanded;

For it is *always* the purpose of a Court of equity to do *full and complete justice to all parties touching the matter in dispute*, brought before it by the original bill, *and to put an end to the litigation;*

and the Court will, *of its own motion*, in a proper case, *direct* a cross-bill to be filled, for the *purpose of developing* THE WHOLE case *and showing the rights of all the parties, and to enable it to decide upon them and make a* COMPLETE *decree.* * * * The new facts which it is proper for the defendant to introduce into a pending litigation, by means of a cross-bill, are such only, as it is *necessary* for the Court to have before it *to enable it to do* COMPLETE *justice* to *all the parties before it* in respect to the cause of action on which the plaintiff in the original bill rests his right to ask for relief.

The defendant, by his cross-bill, should be permitted to fully develop all the facts of the transactions which constitute the cause of action stated in the original bill, and to assert his rights arising out of such transactions."

1890. Morgans Co. v. Ry., 137 U. S., 200, FULLER, CH. J.:

"A cross bill", says Justice STORY (Eq. Plead., § 389), "*ex vi terminorum*, implies a bill brought by a defendant in a suit against other defendants in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill.

A bill of this kind is usually brought either

to obtain a necessary discovery of facts in aid of the defense to the original bill, or 2d, to obtain *full* relief to *all* parties, touching the matter of the original bill, and as illustration of cross bill for relief he says (§ 392):

'It also frequently happens, and particularly, if any question arises between two defendants to a bill, that the Court *cannot* make a *complete* decree *without* a cross bill or cross bills, to bring *every* matter in dispute completely before the Court, to be litigated by the proper parties, and upon the proper proofs.'

It seems to us that in order that a decree might be made upon the *whole* matter in dispute, the cross bill was *necessary*, and was correctly styled a cross bill

In no proper sense were new and distinct matters introduced by it, which were not embraced in the original and amended and supplemental bills; and where it sought equitable relief, it was such as in point of jurisdiction over the subject matter the Court was competent to administer.

It may be that so far as it sought the further aid of the Court beyond the purposes of defense to the original bill, it was not a pure

cross bill, BUT THAT IS IMMATERIAL. THE SUBJECT MATTER WAS THE SAME, ALTHOUGH THE COMPLAINANT IN THE CROSS BILL ASSERTED RIGHTS TO THE PROPERTY DIFFERENT FROM THOSE ALLOWED TO IT IN THE ORIGINAL BILL, AND CLAIMED AN AFFIRMATION UPON THOSE RIGHTS.

A *complete* determination of the matters in litigation *could not* have been obtained except through a cross bill, and different relief from that claimed in the original bill would necessarily be sought.

This bill was filed on leave before testimony was taken, and, though there should be as little delay as possible in filing bills of this

kind, yet *that was a matter entirely within the discretion of the Court*, which *could have directed* it to be filed even *at* the hearing. And whether this bill be regarded as a pure cross-bill or as an original bill in the nature of a cross-bill, or as an original bill, there is no error calling for the disturbance of the decree, because the Court proceeded upon it in connection with the other pleadings."

As to the cross-bill falling with the interlocutory dismissal of the Amended Bill as to Hamilton College the law appears to be as follows:

Bates on Fed. Eq. Proc. (Ed. of 1901, 368), says:

"Where the cross-bill alleges additional facts not alleged in the original bill, but which are directly connected with the subject-matter of the original suit, and prays affirmative relief directly connected with and arising out of the matters of the original suit, and the additional facts alleged, THE DISMISSAL OF THE ORIGINAL BILL DOES NOT CARRY WITH IT THE CROSS BILL, AND THE COURT MAY ORDER THE CAUSE TO BE RETAINED FOR A FINAL HEARING AND DECREE UPON THE CROSS-BILL."

Jessup v. Ills. Cent. R. R. Co., 43 Fed., 493.
Dawson v. Amery, 40 N. J. Eq., 496.
Lowenstein v. Glidewell, 5 Dill., 325.

1901. 2 Bates, Fed. Eq. Prac., S. 665:

"But where the cross-bill sets up, as it may do, additional facts not alleged in the original bill, relating to the same subject matter, and prays for affirmative relief, against the plaint-

iffs in the original bill on the case thus made, THE DISMISSAL OF THE ORIGINAL BILL DOES NOT DISPOSE OF THE CROSS-BILL, BUT IT REMAINS FOR DISPOSITION IN THE SAME MANNER AS IF IT HAD BEEN FILED AS AN ORIGINAL BILL."

Lewenstein v. Glidewell, 5 D. M., 323.
Jessup v. Ills. Cent. R. R. Co., 43 Fed., 495.

Vanderveers Ad. v. Holcomb, 21 N. J. Eq., 109, ZABRISKIE, Ch.:

"But where the dispute, as here, arises between two defendants, one of them cannot know what defence that other will put in until answer filed, and his own answer must be filed within the same time.

A cross-bill is proper in a case like this between the defendants, and I do not know of any rule or reason why it shall not be filed *after* an interlocutory decree which does not determine the question."

Pullmans Palace Car Co. v. Cent. Transfer Co., 49 Fed. Rep., 262, BUTLER, D. C.

"The principal object of the proceeding originally was to accomplish the object which the defendant now seeks; and considerable testimony has been taken with a view to this end. The defendant therefore *would be seriously prejudiced* by its discontinuance, not only *would lose the benefit of the testimony*, but he would also be delayed and might be compelled to seek the plaintiff in another jurisdiction.

The object of the cross bill is to enable the defendant to assume an *aggresive* attitude in the proceeding, *and to use it as a means of settling and closing up* the ENTIRE controversy on which it is founded.

This object seems proper and commendable; and we do not find anything in the rules governing the pleading which forbids its allowance.

Acheson, J., concurred,

2 Daniels Ch. Prac., 1548.

"It frequently happens that a complete decree *cannot* be made without a cross-bill, or cross-bills, to bring the *whole* matter in dispute *completely* before the Court.

In such a case it becomes *necessary* for some, or one, of the defendants to the original bill to file against the plaintiff, and if necessary, other defendants to that bill, or some of them, *and bring the litigation point properly before the Court.*

A cross-bill may also be directed to be filed, *when* at the hearing of a cause, it *appears* that *the suit already instituted is insufficient to bring before the Court* ALL matters necessary to enable it to *fully* decide upon the rights of ALL parties. This most commonly happens where persons in opposite interests are co-defendants; so that the Court cannot determine their opposite interests upon the bill already filed, and the determination of their interests is yet *necessary* to a COMPLETE decree upon the subject matter of the suit.

In such a case the Court will *direct* a bill to be filed, in order to bring the rights of ALL the parties *fully* and properly before it."

Ex Parte Railroad Co., 95 U. S., 225, Chief Justice WAITE:

"It matters not that at a former day in the term a special decree had been rendered upon the subject matter of the cross-bill, and that an appeal from that decree had been taken; for 'a cross bill is a mere auxiliary suit and a dependency of the original'. Cross *v.* DeValle,

1 Wall., 5. As we have said in Ayers *et al. v.* Carver *et al.*, 17 How., 591, 'both the original and cross-bill constitute *one* suit', and *ought* to be heard at the *same* time, consequently, 'any decision or decree in the proceedings upon the cross-bill is *not* a *final* decree in the suit, and not the subject of an appeal to this Court.'

The decree, whether maintaining *or dismissing the bill*, disposes of a proceeding simply *incidental* to the principal matter in litigation, and cannot be reviewed on an appeal from the *final* decree disposing of the *whole* case. *That appeal* brings up ALL the proceedings for re-examination *when the party aggrieved by any determination in respect* to the *cross* bill *has* the opportunity to review it, *as in the case* of ANY other *interlocutory* proceeding in the case. A cross-bill must grow out of the matters alleged in the original bill, and is used to bring the whole dispute before the court, so that there may be a *complete* decree touching the subject matter of the action. 2 Daniels Ch., 1548."

EQUAL PROTECTION.

By departing in this instance from the Settled Rule of Property, and returning to that Rule since the decision herein, the N. Y. Court of Appeals has deprived the widow and next-of-kin of the equal protection of the Laws.

Security Trust Co. vs. *Black River National Bank*, 187 U. S., 227, SHIRAS, J.:

"Cases may be found where a decision made by

a Supreme Court, even in exposition of State Statutes, AFTER the institution of LITIGATION in a Federal Court,—wherein *this Court has refused to follow* such a decision, IF IN IT THE STATE COURT *has departed from its previous decisions*, which were in force AND RELIED UPON BY the Federal suitor. *Burgess* vs. *Seligman*, 107 U. S., 33; *Carroll County* vs. *Smith*, 111 U. S., 556."

Gibson vs. *Lyon*, 115 U. S., 446, MATTHEWS, J.:

"As a precedent, the decision of the Supreme Court of the State, THOUGH SINGLE, is entitled to peculiar respect, because all the questions arise upon the local law of the State. But it CANNOT HAVE *conclusive* force in the courts of the *U. S. unless* it *has become* a *rule of property*. Burgess vs. Seligman, 107 U. S., 20; Carroll County vs. Smith, 111 U. S., 556."

Bolles vs. *Brimfield*, 120 U. S., 763. HARLAN, J.:

"We do not infringe upon the rule that, in respect to rights arising under, and depending upon the interpretation of the Constitution and Laws of a State, this and other Courts of the United States WILL ACCEPT AS CONTROLLING, the ESTABLISHED doctrines of the highest Court of the State, *as announced before such* rights *accrued*. Burgess vs. Seligman, 197 U. S., 33; Carroll County vs. Smith, 111 U. S., 556."

Clark vs. *Bever*, 139 U. S., 117, HARLAN, J.:

"Upon questions of that character the Federal Courts administering justice in Iowa, HAVE EQUAL and CO-ORDINATE JURISDICTION WITH the Courts of that State; although they will lean towards an

agreement with the STATE Court, IF the question SEEMS TO THEM *balanced with doubt.*"

Balkam v. *Woodstock Iron Co.*, (154 U. S., 189.) WHITE, J.:

"In Leffingwell *v.* Warren, 2 Black., 603, Mr. Justice Swayne, speaking for the Court, THUS laid down the RULE. * * * If the highest judicial tribunal of a State, ADOPT *new* VIEWS as to the proper construction of such a statute, *and reverse its former decisions*, THIS COURT WILL FOLLOW the *latest settled* ADJUDICATIONS."

Fallbrook Irrigation District v. *Bradley*, 164, PECKHAM, J:

"If the Act of the State Legislature, as construed by its highest court, *conflicts with* THE FEDERAL CONSTITUTION, or with any valid Act of Congress, IT IS THE *duty* OF the Circuit Court, AND of *this* Court, TO *so* DECIDE. AND TO THUS ENFORCE the provisions of the Federal Constitution."

Wade v. *Travis County*, (174 U. S. 508). BROWN, J:

"If there be *any inconsistency* in the opinions of these Courts, *the general rule is that we follow the latest settled* ADJUDICATIONS, in preference to the earlier ones."

Ultra Vires. JURISDICTION.

When Pleas are False, Judgment Should Be for the Relief Prayed for in the Bill, and for the Cross-Complainant for the Relief Prayed for in the Cross-Bill.

In *Bayley* v. *Adams*, 6 Ves., 494, Lord ELDON, Chancellor, said:

"If (after argument) issue be joined upon the TRUTH of the Plea, and the Plea be found FALSE, *there is an end to the dispute.*"

Flagg v. *Bonnel*, 10 N. J. Eq., 80, WILLIAMSON, V. C.:

"To this Plea (In Bar) the Complainant filed a *replication*, and the case was heard on the pleadings and proofs. The defendant HAS FAILED to support his Plea. The *only* controversy between the parties, WHETHER COMPLAINANT IN ENTITLED TO A DECREE, according to his case, *as made out by the bill;* or, as the defendant insists, whether the Court WILL PERMIT the defendant *to answer.*

The defendant has laid *no special* ground before the Court *why the practice and rules of pleading should be departed from* in THIS case. The case is an *ordinary* ONE AND MUST BE GOVERNED BY THE SETTLED RULES OF PRACTICE. * * *

When he does *reply*, and take issue, the determination *of the issue is final.* The practice *is well settled*, and the decisions are *uniform.* Daniel, Ch. Pr., 224."

p. 85: He cites Lord ELDON and Chancellor WALWORTH as quoted above, and closes his opinion on page 86, as follows:

"The Plea is overruled, and the *complainant is entitled to a decree, according to the case made by his bill.*"

(Oct. 13th, 1900.) *Miller* v. *U. S. Casualty Company*, 46 ATL., 512, EMERY, V. C.:

"Under the settled practice, the Complainant, if the Plea is NOT well founded in fact, *is entitled, without* FURTHER PROOF, TO A FINAL DECREE, *to the extent of the Court's jurisdiction, to grant relief upon his Bill* (Flagg *v.* Bonnel, 10 N. J. Eq., 84; 1 Dan. Ch. Pr., 6th Ed., 697; Story's Eq. Pl. & Prac., 697)."

(May 24th, 1901.) *Hunt* v. *West Jersey Traction Company*, 49 Atl., 435, GREY, V. C.

"If the defendant fails to prove the *truth of* the Plea at the hearing, the Plea will be *overruled* as FALSE; AND THE *Complainant will be entitled to a decree, according to his case, as stated in the Bill* (Flagg *v.* Bonnel, 10 N. J. Eq., 85; Miller *v.* U. S. Casualty Co., *supra*).

Ferry v. *Moore*, 18 Ill. Appeals, 141:

"The evidence bearing on this issue was conflicting, unsatisfactory and inconclusive, and we think the master properly held that the alleged election was NOT Proven.

The Plea being thus *overruled as false*, A DECREE FOR THE PETITIONER *necessarily* FOLLOWED. *The Rule is* that if, at the hearing, the Plea is *not* found to be *true*, it will be *overruled* AS FALSE, and THE COMPLAINANT *will be entitled to* A DECREE *upon a bill taken as confessed* (1 Barb. Ch. Pr., 125.

1902. *Fletcher's Eq. Pl. and Prac., Sec. 290:*

"*Hearing on Plea.*

If, at the hearing, the Plea is NOT found to be

TRUE, it will be *overruled* as False, AND THE COMPLAINANT *will be entitled to* A DECREE AS ON A BILL TAKEN AS CONFESSED (1 Barb. Ch. Pr., 125; Ferry *v.* Moore, 18 Ill. App., 135; Bell *v.* Simonds, 14 Mo., 100; Hunt *v.* West Jersey Traction Co., 49 Atl., 434; Miller, *supra*).

For a *full* consideration of this question, SEE KENNEDY *v.* CRESWELL, 101 U. S., 641; Earl *v.* Metr. Street Rway. Co., 87 Fed. 528.

Langdell's Equity Pleading (2nd Ed.), Sec. 98, says:

"If it (The Court) decides that it (the plea) IS NOT proved, A DECREE IS MADE IN THE PLAINTIFF'S favor, founded upon the equity of the Bill, as admitted by the plea.

Foster's Fed. Prac., 2nd Ed., Sec. 132, says:

"If the plea BE THEN FOUND *false* it *has been held that the plaintiff may, if he so choose, have the bill taken pro confesso. Kennedy v. Creswell*, 101, U. S., 644.

Mifford's Pleading, CH. 2, Sec. 2, Part 2. HAVING PUT THE PLAINTIFF TO THE TROUBLE AND DELAY OF AN ISSUE, defendant *cannot, after* it has been found AGAINST HIM, CLAIM THE RIGHT TO FILE AN ANSWER; although, if the COMPLAINANT desires a DISCOVERY, which the plea is sought to avoid, HE may undoubtedly insist upon it."

Lube's Eq. Pleading, 51. "Should (the truth of the facts of the plea) NOT BE BORNE OUT BY THE EVIDENCE, the plea, which ONLY rests on the SUPPOSITION that the facts are true, FALL TO THE GROUND."

Kennedy v. Creswell, 101 U. S., 643, BRADLEY, J.:

"The appellant insists that, according to the Rules of Equity pleading, the Complainants, by taking issue on the Plea, admitted its sufficiency; and, as the decree was based upon the admission of assets contained in the Plea, it was an affirmation of its truth; and therefore it should have been in favor of the defendants, and the Bill should have been dismissed.

This argument is very ingenious, but it is NOT sound. The defendants not only failed to prove the TRUTH of their Plea, BUT ON THE CONTRARY, the Complainants, by the Executors' own sworn accounts, filed in the Probate office, PROVED, so far as such proof could go, THAT THE PLEA WAS UNTRUE. These accounts show that the Executor had not sufficient personal estate in his hands to pay one-third of the claims alone, so that, according to the strictest rules of Equity pleading THE COMPLAINANTS WERE ENTITLED TO A DECREE IN THEIR FAVOR.

The Executor may have had sufficient assets in fact; BUT HE DID NOT SEE FIT TO DISCLOSE THEM. His admission that he had assets may be taken against him, for the purpose of charging him with a liability, but it cannot serve him as evidence to prove the TRUTH of his Plea. His mere allegations cannot be received as proof of its own truth, when the fact is directly in issue, and the burden of proof is on him.

Since then, THE COMPLAINANTS were entitled to a decree.

THE QUESTION IS—WHAT decree?

If a defendant pleads a FALSE PLEA, AND IT BE SO FOUND,—what is NEXT to be done?

Is it to be MERELY OVERRULED, and an order made that he answer FURTHER? As in case of

OVERRULING A DEMURRER, OR of OVERRULING a PLEA FOR INSUFFIENCY?

THIS is NOT the USUAL COURSE.

Having put the PLAINTIFFS to the TROUBLE *and delay* OF AN ISSUE the defendant CANNOT, AFTER it is found AGAINST him, CLAIM THE RIGHT to file an ANSWER; although, if the complainant desires a discovery, which the plea sought to avoid HE may undoubtedly insist upon it.

But THAT is the COMPLAINANT'S right—NOT the defendant's.

Lord Hardwicke said: "All pleas must suggest a fact; it must go to a hearing; and, if the party does NOT prove THAT FACT, which is NECESSARY to support the plea the plaintiff is NOT to lose the benefit of his discovery, but the Court may direct an examination on interrogatories in order to supply that." Brownsword *v.* Edwards, 3 Ves. 243. This statement is adopted by Lord Redesdale, Mr. Beames and ALL subsequent writers on Equity Pleading. Mitf., 4th Ed. 302; Beame's Pleas on Equity, 318; Story Eq. Pl. Sec. 697.

If the plea IS FOUND TO BE FALSE, it would seem to be just and equitable that the case should stand AS IF THE DEFENDANT HAD ADMITTED THE ALLEGATIONS OF THE PLAINTIFF.

Sir Thomas Plumer states the matter thus: "Supposing a Plea to be correct in form, but PROVED FALSE, it seems to be conceived that the course at the hearing is to take it up, just as if there was NO hearing. THIS IS NOT CORRECT.

Upon a Plea FOUND FALSE,—THE PLAINTIFF IS ENTITLED TO A DECREE, and if a discovery is wanted, the defendant is ordered to be examined upon interrogatories.

Wood v. *Strickland*, 2 Ves. & Bea., 150.

Chancellor Walworth in a case before him, where the defendant PRODUCED NO EVIDENCE to establish THE TRUTH of his Plea said: "Where a Plea in Bar to the hold Bill is put in, if the Complainant takes issue thereon, he admits the *sufficiency* of the Plea, and leaves NOTHING in question, but *the truth thereof*. If at the hearing, the Plea is found to be TRUE, the Bill must be dismissed. But if the Plea is *untruth, the complainant will be entitled to a decree* AGAINST THE DEFENDANT, IN THE SAME MANNER AS IF THE SEVERAL METHODS CHARGED IN THE BILL HAD BEEN CONFESSED OR ADMITTED. If a discovery is necessary to enable the complainant to obtain the relief sought for by his Bill, the defendant cannot evade answering by putting in a plea which turns out to be false.

In such a case, after the Plea is overruled as false, the complainant *may have* an order that the defendant be examined on interrogatories, before a master, as to the several matters in relation to which a discovery was sought *by the Bill*. Bows v. McMichael, 2 Paige, N. Y., 345."

"In the present case, the complainant did not see fit to insist on a further discovery. BEING ENTITLED TO A DECREE PRO CONFESSO AS TO THE PRINCIPAL CHARGES OF THEIR BILL, and the executor having admitted sufficient assets to pay the debts of the estate, they were content TO TAKE A DECREE AGAINST HIM for the amount of the debt. * * *

I AM SATISFIED THAT IN THIS CASE THERE OUGHT TO BE A DECREE FOR IMMEDIATE PAYMENT."

As this leading case stands undisturbed and unqualified as the law, as laid down by this Court

and as unchanged since Lord Eldon so held it January 19th, 1802, more than a century ago, we respectfully ask that it be followed at Bar.

Counsel for certain of the defendants are quite impressed with the joy it must have given the widow to see nine-tenths of her heritage taken from her in the manner seen above, and given to institutions, none of which were selected by her husband, and many of which it is doubtful if she ever heard of.

To be sure, they offer no proof that she viewed them.

To be sure the decision of every Court upon this question has been a trifle rude to this pet view. Possibly *because* there was no *proof* that she ever held *any such view.*

Your Honors will have observed that, while the total her husband gave to all hospitals was but $95,000.

As soon as the deed of "gift" was put upon the market, *hospital* stock soared.

Just why this one, of all that had the *smallest* bequest, namely by $10,000, should suddenly mount up to over $1,000,000, perhaps its president, Mr. Parsons, will explain in his brief.

If any proof is offered upon this point, it would be well to point out in what volume of the record, and upon what page it is found.

A passage not unlike this in tone occurs at the end of the opinion of Judge VANN (Amherst College v. Ritch, 151 N. Y., 343).

It reads thus:

> "We thus reach the final conclusion that all obstacles to the enforcement of the secret trust were lawfully removed, and that it is the duty

of the courts to give full effect to that trust in accordance with the intention of the testator and the promise of his residuary legatees. In announcing this result, which is the nearest approach to justice that we are able to make, it is a satisfaction to believe that the vast fortune involved will be distributed in accordance with the controlling thought and noble purpose of the man who made it."

Just how and where did he discover that it was "in accordance with the intention of the testator and the promise of his residuary legatees" to give his residue to the twenty colleges?

Was it when he *refused to see* one of those residuary legatees *ever again*;

Said that the *sight* of him *could kill him*;

And never saw him again?

Was it in the delicate position of that same residuary legatee in writing Beardsley, Dec. 18, 1890, to point out to the widow of the testator,

"*the hopelessness and unwisdom of a contest* with those who desire to be her *friends*"?

Was it in Beardsley's conduct towards the widow upon receiving this notice;

Was it in the testator—*with his last gasp ordering another one of his residuary legatees*—the Jersey one—*out of the house*?

Will he point to one instance in his judicial experience of as great a scheme to *evade* the law as this one?

In the familiar case of Arnoux *v.* Phyfe, 6 App. Div., 607, Justice BARRETT—who has a habit of calling things by their right names—said where the will gave power *to sell*, but *not* to *mortgage:*

"There is not a shadow of a doubt that Miss

Phyfe WAS SIMPLY USED to EVADE the provisions of the will; and effect the UNLAWFUL purpose of *mortgaging* the property."

In 7 App. Div., 1, Benedict *v.* Arnoux—where Edwin Booth's estate was involved—he will find more plain language, with the true ring to it.

Will Judge Vann put his finger upon the proof which convinced him that signing the fifth codicil was the free, intelligent act of a man in full possession of his faculties—aware of what he was doing—and able to do it?

Will Judge Vann say why the "burned" codicil of four days before, *made in the presence of the family physician and long-time friend of the testator; and of another physician*; when his capacity and freedom from improper influence *are conceded;*

Why that same "burned" codicil is not the TRUE last will of Daniel B. Fayerweather?

A codicil that Judge Vann *never saw;*

And that it is exceedingly probable—thanks to the efforts of Mr. Joseph H. Choate and of Vaughan,—*you* will never see?

Is the next remark of Judge Vann unlike what might be looked for from one so wide of the fact as his opinion shows him to be?

When he admits that that decision "is the nearest approach to justice that we are able to make",——

Does this apology for not arriving at justice make it clear to Your Honors—who have also had a look at this case—that his decision is *sound* and should *stand?*

Upon *what* does he *rest* his statement that

"It is a satisfaction to believe that the vast

fortune involved, *will be distributed in accordance with the controlling thought and noble purpose of the man who made it?*"

Will he show Your Honors the *proof* which *establishes* that *that* purpose was to give it to *the twenty Colleges;*

Exactly where each one of his three executors and trustees *swears that he never intended to give it at all?*

Does he sustain the view that you can take a winow's heritage from her in the manner and by the means of which the proof is before your Honors in the record of this case?

That *this* method of getting something—a VAST something—for NOTHING—is equitable, and just, and right?

Does he find authority for this in these words of one of England's greatest chancellors:

1750. *Earl of Chesterfield* v. *Janssen*, 2 Ves. Sr., 154, HARDWICKE, L. C. Cited in Story's Eq. Jurisprudence, Sec. :

> "THIS Court has an *undoubted* jurisdiction to relieve against EVERY SPECIES OF FRAUD. * * *
>
> 2 *It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses,* AND *not under delusion would make on the one hand; and as no honest and fair man would accept* on the other—which are inequitable and unconscientious bargains."

Is his view of the law in thus obtaining property from the weak and helpless entirely supported by the decisions of the House of Lords and Privy Council in

Thomson v. Eastwood, 2 L. R. Appeal Cases, 233, where Lord Chancellor CAIRNS says:

"Looking at the deed itself, what I find is that the parties to it, on both sides, are placing the payment of this *300* pounds *in discharge* of the legacy of *3,000* pounds, upon a ground which, when it comes to be looked at judicially, shows that if there was no fraud intended and perpetrated by the one side upon the other; there was, at all events, *a state of mind*, upon the part of all the parties to this transaction, which showed that they were under an utter and entire *mistake* and delusion, as to what was and what was not material as to the title of the legatee.

Looked at it in that way, and bearing in mind that it is a dealing between a trustee and his *cestuis que trust*; although I have *no* evidence to fix any fraudulent motive or design upon it; I find it to be a dealing IN WHICH *the trustee*, WITHOUT ANY REASON OR GROUND WHICH CAN BEAR A MOMENT'S *examination* IS PUTTING ASIDE AND *repudiating* AND *denying the title* OF HIS CESTUIS *que trust:*

And is, UPON THE FOOTING OF THAT REPUDIATION, *making* TO HIM A PAYMENT OF *300* POUNDS *in discharge* OF THAT WHICH *ought* TO HAVE BEEN *a payment to him of 3,000* POUNDS.

My Lords, *that*, of course, is a transaction which, unaffected by any question of length of time, or acquiescence, or change of circumstances, COULD *not* BE ALLOWED IN A COURT OF EQUITY TO STAND FOR ONE MOMENT.

IT REQUIRES NO EVIDENCE OF FRAUD TO OVERTHROW IT;

IT IS A TRANSACTION WHICH *in itself* IS ABSOLUTELY NULL AND VOID.

It is, as I took occasion to say to the learned Counsel in the course of the argument AS *invalid*, *as much a nudum pactum* as if a person, without any instrument to support it, chose to set up a payment of 300 pounds in discharge of a debt of *3,000* pounds.

THE INSTRUMENT, WITH ALL THAT IS RELATED IN IT, IS AN INSTRUMENT WHICH CAN*not for a moment* STAND IN *the way of a suit*, if brought in proper time, and brought under proper circumstances, *to recover* THE *legacy* IN RESPECT OF WHICH *this* PAYMENT HAS BEEN MADE."

Will he indicate why and how the words of the Lord Chief Justice and of a Great Lord Chancellor would not have been apt in the case of the widow of Daniel B. Fayerweather?

That it is eminently proper to *starve* a widow into withdrawing her objections, and into giving a general release; will he locate, a precedent for such a position?

Atkinson v. *Denby*, *7 H. & N., 934;* COCKBURN, C. J.:

"Where one person CAN DICTATE and the other HAS NO ALTERNATIVE BUT TO SUBMIT—IT IS COERCION."

And, in the language of Lord Ellenborough, 'ONE HOLDS THE ROD, and THE OTHER BOWS TO IT'. Smith *v.* Cuff, 6 M. & S., 165."

Will he show wherein the following words from the leading text-book writer upon "Fraud and Mistake", do not fit the case at Bar?

1902. "Wherever two persons stand in such a relation, that, *while it continues*, CONFIDENCE IS NECESSARILY reposed by the one, and *the influence* which NATURALLY grows out of that confidence *is exerted* TO OBTAIN AN ADVANTAGE AT THE EXPENSE OF the confiding party, the person so availing himself of his position WILL *not* BE PERMITTED TO RETAIN the advantage, although the transaction should not have been impeached if NO such confidential relation had existed (Tate *v.* Williamson, 2 Ch., 61, BAGNAL *v.* CARLETON, 6 C. D., 371). The *obtaining* property OR OF *any benefit through* the medium and UNCONSCIENTIOUS *abuse of* INFLUENCE, by a person in whom trust and confidence ARE placed, *is a fraud* OF THE *gravest* CHARACTER." MOXON *v.* PAYNE, 8 Ch., 887.

In *equity* fraud *may be presumed;* and in this respect THE RULE DIFFERS FROM the rule of LAW, where IT MUST BE PROVED.

IT MAY BE PRESUMED *from great* inadequacy 30 Pa., 92 top, 20 cases cited there. Thus, where one takes *advantage* of the *distress, pecuniary* or otherwise, of another, *To get a hard and unconscionable* bargain, EQUITY *will* RELIEVE. 10 cases cited. Story's Eq., 239.

So, conveyances obtained from persons *un*INFORMED as to their RIGHTS, OR IGNORANT—*will be set aside*, although there is *no* ACTUAL fraud or imposition. *30 Pa., 92; 1 Bro. P. Cas., 308; 2 Bro. Ch., 150.*

Even where the grantor ADVISES WITH FRIENDS, *They being in equal ignorance with himself. 2 Sch. & Lef., 474;*

And also *where the vendee is in equal ignorance with the vendor.* 8 Hare, 222.

Mere concealment on the part of the vendee, TOGETHER WITH *great* inadequacy *is* A *fraud.* 1 Sudg. Vend., 260. And although the purchaser is not bound to give the grantor information *as to value, yet if a single word be dropped, tending to* mislead the grantor, IT IS SUFFICIENT to affect the application of the principle AND THE SALE WILL BE SET ASIDE."

Hill on Trustees, *146.

**146.* "So; where an EXECUTOR OBTAINED A RELEASE from a LEGATEE by means of a *false representation* to the *legatee.* THAT SHE HAD *no* LEGACY—the release WAS SET ASIDE. Jarvis *v.* Duke, 1 Vennon, 19; and see Murray *v.* Palmer, 2 Scho. & Lef., 474; James *v.* Greaves, 2 P. Wms., 270; Horseley *v.* Chaloner, 2 Ves., 83.

**147.* The misrepresentation may be equally a matter of equitable cognizance—whether it be BY DEEDS as BY WORDS; *by artifices to mislead,* OR *by positive assertions.* A Court of equity, says Lord THURLOW, *would make itself ridiculous if it permitted a distinction between the two cases.*"

Will he say that Mrs. Fayerweather had had the FULL disclosure which the law commands made to her by these three fiduciaries of ALL they knew that would tell her her rights—before they got her withdrawal and release?

Will he state why these words of this Court do not apply to this case? Namely in Foster *v.* Mansfield, &c., R. R., 146 U. S., 99, by *Brown, J.*:

"*If a person is ignorant of his interest in* a cer-

tain transaction, *no negligence is imputable to him for* failing to inform himself of his rights."

Or these?

EXTORTION.

1 Ves., 221. NOTE.

"Where an *unreasonable* contract; or even conveyance, HAS BEEN *extorted* FROM a party in DISTRESSED circumstances, his tacit submission *during the continuance* OF THE SAME DISTRESS which PRESSED *him to enter into the contract,* NAY, HIS *formal confirmation stands for nothing.*"

INADEQUACY.

1 Am. & Eng. Decisions in Equity. (*1895.*) 1st Series. Notes by Budd:

202. "But there may be SUCH *apparent unconscionableness* AS IN ITSELF TO AMOUNT TO A PRACTICAL *demonstration of* FRAUD. 2 Ves., 16; *Huguenin* v. *Basely,* 14 Ves., 273; 26 Beav., 665, 161; 2 De G. J. & Sm., 155; 35 Beav., 510; L. R., 8 Ch. App., 490; 10 do., 389; *30 Pa., 91; 17 Vt., 9.*

Ignorance of the Law Mistake.

The rule requires information to be given of matters of law, as well as of fact. The releasor must not only be acquainted with the facts, but apprised of the law how these facts would be dealt with by a court of equity. The maxim *ignorantia juris excusat neminem,* cannot be invoked in such a case.

Adair v. *Brimmer, 74 New York, 539, 554.*

Haviland v. *Willets, 141 New York, 35.*
Champlin v. *Layton, 6 Paige Ch., 197.*

Equity will relieve against mistakes *of law* as well as fact.

Stone v. *Godfrey, 5 D. M. & G., 90.*
Rosers v. *Ingraham, L. R., 3 Ch. Div., 35.*

ABBOTT, C. J., in *2 Car. and Payne 16,* speaking of the presumption that everyone knows the law, said: "*God forbid that it should be imagined!*"

LORD MANSFIELD said (*Cowper, 38–40*): "*As to the certainty of the law, it would be very hard upon the profession if the law was so certain that everybody knew it. It is so uncertain that it costs much money to know what it is, even in the last resort.*"

Hunt v. *Rousamere, 8 Wheaton, 205.*
Champlin v. *Layton, 6 Paige Ch., 197; see Mr. Cutting's Brief, p. 201.*

In *Cooper* v. *Phipps* (L. R., 2 House of Lords, 170) Lord WESTBURY says: "It is said *ignorantia juris excusat neminem,* but in that maxim the word *jus* is used in the sense of denoting *general law*—the ordinary law of the country. But when the word *jus* is used in the sense of denoting a *private right,* that maxim has no application. *Private right of ownership is a matter of fact.* It may be the result also of matter of law. But, *if parties contract under a mutual mistake and misapprehension as to the relative and respective rights, the result is* that *that agreement is liable to be set aside* as having proceeded *from a common mistake.*"

Both thought the trust honorary.

Mr. WHARTON, in his work on "*Contracts*", p. 199, says: "As a rule it may be asserted that "ignorance of a *right*, which is a mixed question "of law and fact, is to be treated as *ignorance of a* "*fact.*"

You then said the bequest was absolute.

You now say it was only a discretionary.

Why did you not tell us so THEN? Why?

If, as Judge TRUAX says, in his opinion (*fol. 4217*), Messrs. Ritch, Bulkley and Vanghan "did "*what they thought they had a right to do*"—that is, if they honestly believed that this whole residuary estate belonged to them to do with as they pleased, then these transactions with the widow and next-of-kin should be set aside for *mutual misunderstanding and mistake.*

In *Haviland* v. *Willets* (141 New York, 35), decided in the Court of Appeals, January 16th, 1894, the plaintiff's next-of-kin had released to the executor his interest in the estate, knowing the facts upon which his right to a lapsed legacy depended, but in ignorance of the law which entitled him to such legacy. The executor knew both the facts and the law, but did not advise him of his rights. The plaintiff thought that money was being to him and that he was parting with nothing. The release was set aside, except so far as payments had been made under it after the plaintiff learned of his rights, and before suit brought.

Judge FINCH, in a carefully written opinion, says: "Assuming, as counsel for the appellant contends, "that plaintiff's mistake was one of law, and that "the general rule excludes equitable relief for such

"a mistake when it is one of law pure and simple, "and no other elements are present, it is still obvi- "ous that the doctrine does not cover the entire "array of facts here disclosed. It is equally well "settled that, when there is a mistake of law on "one side, and either positive fraud on the other, "or inequitable, unfair and deceptive conduct, "which tends to confirm the mistake and conceal "the truth, it is the right and duty of equity to "award relief. All the cases which deny a remedy "for mere mistake of law on one side are careful "to add the qualification that there must be no "improper conduct on the other (*Silliman* v. "*Wing, 7 Hill, 159; Flynn* v. *Hurd, 118 N. Y.*, "*26; Vanderbeek* v. *City of Rochester, 122 Id.*, "*285*). There was in this case evidence of *a studi- "ous concealment of the precise point* essential to "the free and intelligent action of the plaintiff, "by the executor, in whose position and ability "some confidence was reposed."

Body v. *DeLaMontagnie*, 74 N. Y., 500, CHURCH, Ch. J.

"A Court of Equity will interpose its jurisdiction to set aside instruments between persons occupying relations in which one party may naturally exercise an influence over the conduct of another."

P. 503. STORY says, "Hence the law, with a wise providence, not only watches over all the transactions of parties in this predicament, but it often interposes to declare transactions void which between other persons, would NOT be held objectionable. It does not so much consider the bearing or hardship of its doctrine upon particular cases AS IT DOES THE IMPOR-

TANCE OF PREVENTING A GENERAL PUBLIC MISCHIEF, WHICH MAY BE BROUGHT ABOUT BY MEANS, SECRET AND INACCESSIBLE TO JUDICIAL SCRUTINY FROM THE DANGEROUS INFLUENCES ARISING FROM THE CONFIDENTIAL RELATION OF THE PARTIES (Story's Eq. Jr., 310). A MISAPPREHENSION OF A PARTY MAY BE SUFFICIENT (Gee *v.* Spencer, 2 Ves., 410 and note). LORD ELDON IN HUGUENIN *v.* BASELEY, 14 Ves., 273, says: That when the decision rests upon the ground of public utility, for the purpose of maintaining the principle IT IS NECESSARY TO IMPUTE KNOWLEDGE WHICH THE PARTY MAY NOT ACTUALLY HAVE HAD. * * *

It follows that the parties ACTED UNDER A MUTUAL *mistake*, and even if it be regarded a mistake *in Law*, IT IS ONE, I APPREHEND, WHICH COURTS OF EQUITY WILL RELIEVE AGAINST, ESPECIALLY BETWEEN PARTIES THUS SITUATED. (Story's Eq., Sec. 38).

P. 476. A *compromise* which is founded ON A MUTUAL MISTAKE OF FACT CAN NOT BE SUPPORTED. Hickman v. Berens, 1895, 2 Ch., 638; Huntersfield Banking Co. v. Lister & Son, 1895, 2 Ch., 273–472. If parties enter into an agreement with reference to a supposed state of things and it turns out that by the mutual mistake of the parties the supposed actual state of things DOES NOT IN FACT SUBSIST, the consideration for the agreement FAILS and the agreement is consequently void. Stapleton v. Scott, 13 Ves., 427; Robinson v. Dickenson, 3 Russ, 413; Cooper v. Phibbs, L. R., 2 H. L., 149.

Your Honors have thus seen how the decrees of the Surrogate—upon which the legal title of this residuary estate rested—were obtained;

You have next seen that the Trial Court in Amherst v. Ritch *never tried the main issue in the case.*

Why does not the question Judge Sawyer asks, in deciding a case—which was affirmed by this Court (94 U. S., 477), apply also here?

In STARR *vs.* STARK, 2 SAWYER, United States Courts Reports, Ninth Circuit, SAWYER, J., said:

"It is still insisted that, since the title now set up was not in fact litigated and not permitted to be litigated, the proceeding in the former case is not *res adjudicata. If* the Circuit Court of Oregon was right in *compelling* plaintiffs to elect, *then the judgment* in the former case *is not a bar* to this action, *because* the complainant *has never had an opportunity to be heard*, and *he is not to lose his rights* for not litigating. If the Court was in error, *it still prohibited them from litigating the claim in that action and deprived the parties of a right by compelling them* to elect one cause of action *and omit the other in either case without any fault of their own; they have, in fact, been afforded no opportunity to be heard at all on their present cause of action* they did elect, and the wisdom of that election was vindicated by the judgment of the highest Court of Oregon, which sustained the title ultimately relied on in that action and decreed the appropriate relief, but that court also turned out to be in error, and the decree was reversed by a still higher tribunal. *Shall complainant now be cut off* from procuring *adjudication* of his rights, *because*, under *such* circumstances, *the court erroneously prevented him from having it adjudicated before?*"

As already seen, there is no need of further trial.

In their answers forming part of their pleas every defendant states thus:

"And this defendant, *not waiving* its said plea, but wholly relying and insisting thereon, and in aid and support thereof, *for answer to the said bill, or to so much and such part thereof* as this defendant is advised it is in any wise *material or necessary* for it to make *answer unto, answering, saith:*"

Each has thus had all that an answer could give it.

They would, no doubt, like to hold on to it.

Monge 253 840

Why does not the remark of Judge Peckham in that case (page 278) apply, namely:

"If the property of the decedent has been wasted through his (the executor) carelessness and want of proper attention:

he will be liable.

This rule was laid down by Mr. Justice Nelson in Schulz *v.* Pulner (11 Wend., 363, 366), where the administrator was held liable in a very plain case."

* * *

P. 282.—This is said of a case where the trust deed was *not* even void on its *face*, but because of an *extrinsic* fact, viz: the failure of the necessary creditors to consent to it."

In the latter case (35 Bleav. 378) Lord Romilly, M. R. added:

"I must make a decree for the plaintiff and *as* Mr. Dresser (the assignee) *has occasioned this suit* HE *must pay the costs of it.*"

As these three men swore that they owned the residue absolutely, why should they not personally pay into the estate all they have taken out of it, in trying to get it absolutely this property for more years.

But, if they do not own it, is it not nearly time that its owners have it?

This Court deals with such a case.

In

GRAFFAM *v.* Burgess, 117 U. S., 185, by BRADLEY, J., it said:

"It is insisted that the proceedings were all conducted according to the forms of law. Very likely. SOME OF THE MOST ATROCIOUS FRAUDS ARE COMMITTED IN THAT WAY. INDEED, THE GREATER THE FRAUD INTENDED, THE MORE PARTICULAR THE PARTIES TO IT OFTEN ARE TO PROCEED ACCORDING TO THE STRICTEST FORMS OF LAW.

"Considering the amount of the stake to be won, and the overwhelming injury to be inflicted upon an unsuspecting woman, it is difficult to regard with equanimity the proceedings of the defendant."

And if these three fiduciaries, instead of obeying the law as written before their eyes in O'Connor *v.* Gifford, 117 N. Y., 278, by Peckham, J.,

Have ignored and disregarded that law;

Also the costs of this case, as Mr. Parsons had to do in Edson *v.* Bartow (10 App. Div., *supra*).

1888: *Matter of Bailey, 41 Hun, 478, Parker, J.:*

"The services rendered by the attorney WERE NOT FOR THE PROTECTION OR BENEFIT *of the estate*, BUT WERE SOLELY FOR THE BENEFIT *of the executor*, IN ACTIONS BROUGHT AGAINST HIM FOR

misconduct, IN THE OFFICE OF EXECUTOR; and while he was successful in the litigation the evidence before the Surrogate, as to his conduct of the trust, *fully warranted* A REFUSAL TO BURDEN *the estate* WITH THE EXPENSE OF THE LITIGATION. The decree should be modified BY STRIKING OUT THE CREDIT OF THREE HUNDRED AND FIFTY DOLLARS PAID TO LAWRENCE AND WALDRON."

88 N. Y, 387: *Croft* v. *Williams et al.*, *Finch, J.*:

"These items also were accounted for IN NO MANNER as having been expended FOR THE BENEFIT *of the estate*, and were PROPERLY charged against the *executor* in his account. * * *

Re Titlow's Estate. 163 Pa., 35. 29 Atl., 758.

"An executor IS *not* ENTITLED to the *costs and counsel fees* incurred by him in defending a contest of his testator's will, WHERE HIS CHIEF MOTIVE IN DOING SO WAS FOR HIS OWN PROTECTION AS PRINCIPAL DEVISEE, *notwithstanding* the parties litigant entered into a *compromise*, agreeing for a division of the testator's property, but containing no stipulation as to such costs.

HEAD NOTE—An executor is not bound to defend his testator's will; and, if he undertakes to do so, it must be as the agent of, and in the interest of those benefitted by his action, Page 39, In Yerkes's Appeal, 99 Pa., 401, in an opinion by the present Chief Justice, it is held as a general rule, deducible from all the cases decided in *this* State, that an executor is not bound to defend his testator's will, and if he undertakes to do so, IT MUST BE AS THE AGENT OF, AND IN THE INTEREST OF *those benefitted by his actions*," viz., the 3x20.

Re Titlow's Estate, 163 Pa., 39.

"True he was executor, and so named of record. But his stand for the will in the litigation WAS *because he* WAS *a devisee*, and it WAS LARGELY TO *his* INTEREST TO SUSTAIN IT. He could, unequivocally, in his answer to the citation, have disclaimed any interest AS DEVISEE in the contest, and *then* the Court would have made such order as would have been proper touching the issue.

IN SUBSTANCE, HIS POSITION ON THE RECORD AS EXECUTOR, WAS THAT OF REPRESENTATIVE *of himself as devisee* OF ONE-HALF OF THE ESTATE; AND IN *that* ATTITUDE *was conducted his side of the contest* UNTIL THE AGREEMENT, TWO-FIFTHS OF THE ESTATE, WENT TO HIS FAMILY."

Your Honors will observe that Judge Lacombe reserved the question of costs for this Court, showing clearly what he thought as to it.

If these ladies have been kept out of their property for fourteen years

Not by the Colleges;

But by those who wrongly advised the Colleges, and by said three fiduciaries.

Why should they not now receive their property *intact?*

With interest thereon *since Mr. Fayerweather died?*

And if these fiduciaries had no just ground to so withhold said property, why should not legal interest thereon compound annually?

While the judgments in the first instance should be against these three fiduciaries who have caused what Justice Peckham so truly characterized as "a DISASTER".

Two things are fortunate.

First.—Two of said three men are currently reported to have great wealth.

Secondly.—They should recover this property from those who have it, and to whom it does not belong;

And deliver it to those to whom it does belong.

And it would be agreeable to these ladies to have *all* costs of the colleges come out of the estate,

For your Honors will observe, in closing, that WHY these three fiduciaries suppressed the proofs of the rights of these ladies;

And misrepresented the facts to them, *is not material or necessary to be decided.*

But if they DID so, then why should not the course laid down by this Court in Arrowsmith v. Gleason, in Marshall v. Holmes, and in so many other cases, be the course now?

Why should your Honors not say to these three men, Deliver this property to its owners?

Respectfully submitted.

WILLIAM BLAIKIE,

Of Counsel for John B. Reynolds, as Sole Executor of Lucy Fayerweather, Widow of Daniel B. Fayerweather, deceased, Appellant.

Oct. 5th, 1904.